SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 170

THE UNITED STATES, PETITIONER

vs.

PENNER INSTALLATION CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 47266

PENNER INSTALLATION CORPORATION, CLAIMANT

v.

UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed August 9, 1946

To the CHIEF JUSTICE AND JUDGES OF THE COURT OF CLAIMS:

The petition of Penner Installation Corporation respectfully alleg and shows to this court as follows:

1. That claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

2. That no assignment or transfer of the claims hereinafter set forth or any part thereof has been made.

3. That your claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the United States.

4. That heretofore and under date of September 28, 1944, claimant as contractor duly entered into a contract with the
2 defendant for the furnishing of the materials and the performance of the work for constructing a series of lighting systems consisting of installation of runway marker lights and supplementary facilities, at the Port Erie Airport, Erie County, Erie, Pennsylvania, Schedule 1, Proposal No. 1–45–400, pursuant to Specifications and Drawings attached thereto and all Addenda thereto. An exact copy of this contract is annexed hereto and marked Exhibit "A".

5. That claimant has duly performed all the terms and conditions of said contract on its part to be performed, except as prevented, interfered with and delayed by the breaches and violations of the contract on the part of the defendant, as more particularly set forth in paragraph numbered "6" hereof.

6. That the defendant breached and violated the terms of the said contract, in that it arbitrarily, unlawfully and contrary to the provisions of the contract, plans and specifications, required the claimant to perform and furnish labor and materials not called for by said Contract, Plans and Specifications; that it required claimant to furnish labor and material in a manner contrary to the quality, quantity and method called for in the Contract, Plans

and Specifications; arbitrarily and unreasonably classified various items of work erroneously and failed and refused to pay for the proper classification and value of the work performed; required the claimant to perform the work in a manner contrary to the requirements of the contract and in a far more costly and expensive manner; made material and substantial changes in the plans, drawings, nature and kind of work to be done; interfered with claimant's performance of its work; and generally interfered with and delayed claimant in the performance of its work and the
3 completion of its contract; deliberately withheld payments from the claimant for long periods of time after said payments were properly due and payable; deliberately underpaid claimant and underestimated the amount and value of labor and material furnished and performed by the claimant; and failed to pay for the full value of all labor and materil furnished and performed by claimant under the proper classifications thereof. That the defendant's actions caused claimant damage as follows:

Underpayment on following items under contract classifications:

(a) 3–12 (a)	$380.00
(b) 3–141 (c)	1,448.85
(c) 3–141 (d)	6,280.00
(d) 3–141 (e)	197.00
(e) 3–141 (h)	96.00
(f) 3–141 (l)	19.95
(g) 3.12 (k)	1,550.58
(h) 3.12 (l)	1,255.30
(i) 3.12 (m)	431.97
(j) 3.12 (n)	453.75
(k) 3.12 (o) #1	85.19
(l) 3.12 (o) #2	179.98
(m) 3.12 (o) #3	728.35
(n) 3.12 (o) #4	181.60
	$13,288.52

The following extra and additional work and damages suffered because of improper classifications and requirements as hereinabove set forth:

4 Assembling Government furnished Condulets, els, conduit nipples, etc. for obstruction Lighting	$53.28
Installation of 90 Degree 1¼ inch-conduit els, at Marker Light Units	641.37
Installation of 1¼ inch-Conduit for Obstruction Lighting	1,307.20
Installation of Structural Steel Supports and Bands for Isolation Transformers	165.66
Installation of Overhead #4 Wires on Poles outside of Fence near Ford Avenue	82.88
Chipping Macadam Pavement around Light Pads and repairs to same	958.01
Temporary and Permanent repairs to Ceiling Light Cable	348.04
Smoothing and Grading the Area around 89 Series Flush Contact Lights to provide free drainage of surface water away from the pads	326.00

	Extra cost involved in complying with exception list issued after job had been completed and accepted and all exceptions originally issued had been complied with	$71.63	
5	General Interference and Delay	2,397.00	
	Interest on moneys concededly due Claimant and arbitrarily and unreasonably withheld for long periods of time	500.00	
			$6,851.07
	Total		20,139.59

7. That no part of said sum of $20,139.59 has been paid, although the same is now due and owing.

8. That the claims as hereinabove set forth were duly presented to the Contracting Officer and duly appealed to the Secretary of Commerce within the time provided by said contract, and Claimant took all steps as required by said contract to have the actions of the defendant reviewed in accordance with the terms thereof. That the defendant has failed and refused to pay said claims. That no other action on said claims has been had either in Congress or in any of the Departments, except as above set forth.

9. That the claimant has the sole right to prosecute the same; that no assignment or transfer of said claim or any part thereof or interest therein has been made, nor has any part thereof been paid; that claimant is justly entitled to the amount claimed from the defendant as herein set forth.

10. That more than six years have not elapsed since claimant's cause of action has accrued herein.

11. That by reason of the aforesaid, there is now due and owing from the defendant to the claimant the sum of $20,139.59.

6 Wherefore, claimant, Penner Installation Corporation, demands judgment in the sum of $20,139.59, with interest thereon.

PENNER INSTALLATION CORPORATION,
Claimant.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys for Claimant.

By ALBERT FOREMAN,
Member of Firm.

7 *Exhibit to petition*

Contract No. Clca–4802
Negotiated Contract

CONTRACT

(Construction)

Penner Installation Corporation
Cantiague Road
Hicksville, New York

(Contractor)

Department of Commerce
Civil Aeronautics Administration
385 Madison Avenue
New York 17, New York

(Department)

Contract for: Constructing Series Lighting System

Estimated
Amount, $8,405.50

Place: Port Erie Airport, Erie County, Erie, Pennsylvania

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 28th day of September 1944, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Penner Installation Corporation, a corporation organized and existing under the laws of the State of New York, of the city of Hicksville, Long Island, in the State of New York, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for construct-
8 ing a series lighting system consisting of installation of runway marker lights and supplementary facilities at the Port Erie Airport, Erie County, Erie, Pennsylvania, located about seven (7) miles South of the City of Erie, Pennsylvania, in accordance with Schedule I, Proposal No. 1–45–400 for the consideration of the estimated sum of Eight Thousand Four Hundred and Five Dollars and Fifty Cents ($8,405.50), the contractor to be paid for actual quantities at unit prices originally quoted in Schedule I, Proposal No. 1–45–400 in strict accordance with the specifications, schedules, and drawings, all of which are made a

part hereof and designated as follows: Bid on Proposal No. 1–45–400, including the specifications and drawings specified therein and attached hereto.

The work shall be commenced within ten (10) calendar days from the effective date of the Notice to Proceed and shall be completed within forty-five (45) calendar days from the effective date of the Notice to Proceed.

ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specification shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

9 ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for

in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 6. *Inspection.*—(*a*) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the rejected material from the premises. If the contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in article 9 of this contract, the contractor and surety being liable for any damage to the same extent as provided in said Article 9 for terminations thereunder.

(*b*) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(*c*) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work

is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(*d*) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the
12 requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

ARTICLE 7. *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to remove from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable, or whose continued employment on the work is deemed by the contracting officer to be contrary to the public interest.

ARTICLE 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

13 ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue to work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or

14 delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties

hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ARTICLE 10. *Permits and responsibility for work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 11. *Eight-hour law—Overtime compensation—Convict labor.*—(*a*) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, 325a, and 326, relating to hours of labor and compensation for overtime.

(*b*) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE 12. *Covenant against contingent fees.*—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give

the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideraion the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ARTICLE 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided however, That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Governmet to require the fulfillment of all of the terms of the contract.

(*d*) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract,
18 other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

ARTICLE 17. *Rate of wages.*—(In accordance with the act of August 30, 1935, 49 Stat. 1011, as amended by the act of June 15, 1940, 54 Stat. 399 (U. S. Code, title 40, secs. 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia.)

(*a*) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

19 (*b*) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the con-

tract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(*c*) The regulations of the Secretary of Labor, referred to in article 19 hereof, allow certain "permissible deductions" from the wages required by this article to be paid.

ARTICLE 18. *Domestic preference.*—In the performance of the work covered by this contract the contractor, subcontractors, material men or supplies shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be expected by the head of the department under the proviso of title III, section 3, of the act of March 3, 1933, 47 Stat. 1520 (U. S. Code, title 41, sec. 10b).

20 ARTICLE 19. *Nonrebate of wages.*—The contractor shall comply with the regulations of the Secretary of Labor pursuant to the act of June 13, 1934, 48 Stat. 948 (U. S. Code, title 40, secs. 276b and 276c), and any amendments or modifications thereof, shall cause appropriate provisions to be inserted in subcontracts to insure compliance therewith by all subcontractors subject thereto, and shall be responsible for the submission of affidavits required of subcontractors thereunder, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions from the requirements thereof.

ARTICLE 20. *Additional security.*—Should any surety upon any bond furnished in connection with this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government or of persons supplying

labor or materials in the prosecution of the work contemplated by the contract.

ARTICLE 21. *Definitions.*—(*a*) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(*b*) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

21 ARTICLE 22. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto:

The sentence reading "No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative" in Article 3 of U. S. Standard Form 23 entitled "Changes" is hereby deleted.

THE UNITED STATES OF AMERICA,
By: A. J. MASSARI,
A. J. MASSARI,
Administrative Officer.
(Official title)
PENNER INSTALLATION CORPORATION,
By: ISAAC PENNER,
Contractor.
Title: *President.*
Hicksville, N. Y.
(Business address)

Two witnesses:
SYLVIA PENNER.
BERTHA KATZ.

22 I, Sylvia Penner, certify that I am the secretary of the corporation named as contractor herein; that Isaac Penner, who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] SYLVIA PENNER.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, Isaac Penner, who signed this contract for the Penner Installation Corporation, had authority

to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

A. J. Massari,
A. J. Massari,
Administrative Officer.

This contract is authorized by the acts of Public Law No. 365—78th Congress, Chapter 294—2nd Session, H. R. 4204.

23 Duly sworn to by Isaac Penner; jurat omitted in printing.

25 *General traverse*

Filed September 18, 1946

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) John F. Sonnett,
Assistant Attorney General.

E. E. N.
J. B. M.
E. E. E.

Argument and submission of case

On May 3, 1949, the case was argued and submitted on merits by Mr. Albert Foreman for plaintiff, and by Mr. John R. Franklin for defendant.

27 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J.*

Filed October 3, 1949

Mr. Albert Foreman for plaintiff. Messrs. M. Carl Levine, Morgulas & Foreman were on the brief.

Mr. John R. Franklin, with whom was Mr. Assistant Attorney General H. G. Morison, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. On September 28, 1944, plaintiff, a corporation organized under the laws of the State of Delaware, entered into a contract with the defendant for the furnishing of part of the materials and the performance of work for the construction of a certain lighting system at the Port Erie Airport, Erie, Pennsylvania.

The contract provided that the work was to be completed within 45 days from the notice to proceed, which notice to proceed was given effective October 4, 1944.

2. The Instructions to Bidders in the proposal for the contract included the following:

"1. *Preparation of bids.*—Unless otherwise directed in the invitation, bids shall be submitted in triplicate. Forms furinshed, or copies thereof, shall be used, and strict compliance with the requirements of the invitation, these instructions, and the instructions printed on the forms is necessary. Special care should be exercised in the preparation of bids. Bidders must make their own estimates of the facilities and difficulties attending the performance of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies. All
28 designations and prices shall be fully and clearly set forth. Copies of the bids shall be identical. The proper blank spaces in the bid and guaranty forms shall be suitably filled in.

"2. Labor and material not to be furnished by the Government.—The Government will not furnish any labor, material, or supplies unless specifically provided for in the contract."

The contract contained the following provisions:

"ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

* * * * *

"ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

* * * * *

"ARTICLE 10. *Permits and responsibility for work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged.

* * * * *

29 "ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The Special Proposal Conditions which formed part of the contract contained the following:

"1.7 *Quantities and unit prices:* The quantities noted in the schedule of items are approximations for comparing bids, and no claims shall be made against the United States for excess or deficiency therein, actual or relative. Payment at the unit prices agreed upon will be in full for the work completed and will cover materials, supplies, labor, tools, machinery and all other items of expenditure incident to satisfactory performance of the contract, unless otherwise specifically provided."

3. After the work was completed but before final payment, the plaintiff, under date of June 20, 1945, presented to the Civil Aeronautics Administration an itemized statement of amount claimed to be due. On November 15, 1945, the defendant granted an allowance on a few of the items but denied the remainder. On November 28, 1945, plaintiff appealed to the Secretary of Commerce, but the decision of November 15 was sustained. The items set forth in the petition were listed in the statement of June 20, 1945.

Obstruction Lights on Poles

Contract item 3.12 (a)

4. Work involved under this item was the installation of the obstruction lights on the poles, together with the necessary conduit. The work, except for connecting the wires to the sockets, was the same whether a single or double light was furnished.

In a number of places the plans called for double lights. However, double lights were not then available. For the places where
30 the plans called for double lights, the defendant furnished for the work two single lights and certain fittings by means of which the two lights could be assembled as one double light. It was the plan of the defendant to have this assembling done by defendant's employees at the field, and a few were so assembled. However, plaintiff's president volunteered to have the work done by its employees at times when those employees could not be employed on the contract work because of inclement weather. Thus plaintiff assembled most of the double lights. A total of 15 double lights was thus assembled, using 30 single lights and the necessary fittings. These 15 double lights and 11 single lights, or a total of 26 light units on the poles, were installed. Under this item the plaintiff was paid for 24 installations at $20 each. The other two double lights were installed in connection with another item (3.12 (n)), for which payment was made. (See finding 11.)

Fair and reasonable compensation for assembling these lights was $16.00.

6" x 18" Trench

Contract items 3.1§1 (c)

5. As a part of the work, it was necessary to dig trenches around the three runways and at certain other places on the field in order to bury the cable which carried the current to the lights. The contract provided a unit price of 13 cents per lineal foot for a 6" x 18" trench. The defendant paid the plaintiff for 23,855 lineal feet. This was in part based on measurements purported to have been made by the city engineers of Erie, Pennsylvania. The evidence establishes that a total of 27,296 lineal feet was actually excavated. The plaintiff was therefore underpaid on this item to the extent of 3,441 lineal feet.

Cable Trench in Excess of 6" x 18"

Contract item 3.1§1 (d)

6. The contract provided that for any trenches excavated for the work in excess of 6" x 18", the plaintiff would be paid
31 $5 per cubic yard. The evidence establishes that plaintiff excavated 629 cubic yards of such excess size trenching, which was 426 cubic yards more than the 203 cubic yards for which it was paid.

Cable in Trench

Contract item 3.14½ (e)

7. The contract provided for the payment to plaintiff of two cents per lineal foot for placing the cable in the trench. The computation of the length of the cable placed in the trench was predicated on the computation of the lineal feet of trench dug for it, and the evidence establishes that there were 35,071 feet of cable actually placed, including the amount necessary for the required loops at the various lights and five percent allowance for slack. The plaintiff was paid for 34,395 feet, there being an underpayment of 676 feet.

Cable Splices

Contract item 3.14½ (h)

8. The contract provided a unit price of $16 for a cable splice. There were actually 29 cable splices made in connection with the work. Under this particular item the plaintiff was paid for 23 splices. Six splices were made in connection with repairs to an existing cable, which was cut in connection with the excavating of the trenches, as set out in finding 19.

Clearing Ducts

Contract item 3.14½ (i)

9. As a part of plaintiff's work on the airfield, it was necessary to put the cable through some existing ducts. These ducts were partially filled with mud and other debris and plaintiff was ordered in writing to clear the ducts. A price for doing the work was to be determined later. The price was later fixed at 19 cents per lineal foot. The evidence establishes that there was a total of 5,495 feet of duct cleared, which was the amount for which the plaintiff was paid.

Driving Conduit Under Road

Contract items 3.12 (k) and 3.12 (l)

10. After the work was started the plans were changed so as to make it necessary to install 2-inch conduit under 12th
32 Street and also under Ford Avenue, the boundary lines of the airfield. Under 12th Street, 60 feet of such conduit were installed, and 40 feet were installed under Ford Avenue. This work was ordered in writing and plaintiff was requested to submit a price for doing the work, which price was submitted

after the work had been completed. Plaintiff first submitted a price under date of November 18, 1944, of $32 per lineal foot, although it later and formally agreed to do the work for $6 per lineal foot. It now contends that a fair and reasonable value for doing this work is $35.80 per lineal foot. Defendant fixed the price of $4 per lineal foot and paid plaintiff on that basis for the agreed length of the two conduits. The evidence establishes that a fair and reasonable price for doing this work is $8 per lineal foot.

Remove Wood Poles and Reduce Height of Existing Poles

Contracts items 3.12 (m) and 3.12 (n)

11. Some of the existing obstruction lights at the airfield were deemed to be too high and plaintiff was ordered in writing to remove some of these poles and reduce the height of others. The work involved in removing the poles was the removal of the hardware and the wire from the poles and disposal of the poles after the work was done. Before the work was undertaken, plaintiff submitted a price of $100 a pole for the work of removing the poles. This price was not agreed to by the defendant, but the plaintiff proceeded with the work. After the work was performed, plaintiff submitted another price which amounted to $183.99 for each of the poles removed. Four poles about 40 feet high were actually removed, and the defendant fixed the price at $30 each. This amount is not less than a fair and reasonable price for the work performed. As a part of this work the plaintiff was also directed to reduce the height of two other poles. This involved removing the lights and wire and other fittings, cutting off the top of the pole and reinstalling the accessories. Before the work was done, plaintiff bid $190 per pole, and after the work was performed, plaintiff submitted a break-down of prices showing a price of $271.88 per pole. Two poles were actually reduced in height. On these poles, in place of the existing single
33 lights, double lights were installed. The double lights were assembled lights, as set out in finding 4.

For this work the defendant fixed a price, including the lights, of $45 per pole, and plaintiff was paid on this basis. The amount paid is not less than a fair and reasonable price for the work.

Furnish and Install Wood Poles

Contract item 3.12 (o)

12. Plaintiff originally bid $70 to furnish and install poles, but after the bid was submitted, the plaintiff was told that no poles

would be required, and at the Government's request plaintiff reduced the bid for this item to $35 per pole. This was done to *lower the total cost of the estimated work at the airport.* After the work had started, it was decided to place some poles near the ends of the runways, and plaintiff was directed to furnish and install them. The work was actually ordered by Equalization Order of November 14, 1945. A total of 12 poles of varying lengths between 18 and 30 feet was installed pursuant to the directions. After two of the poles had been installed, the lighting was again rearranged so that these two poles had to be reduced in height. This work was done during the winter time and the painting of the poles was postponed until the spring. Under the conditions under which the work was performed, a fair and reasonable price for the work is $70 per pole. Plaintiff was paid for the 12 poles at the reduced bid price of $35 per pole.

EXTRAS

Installation of 90° Bends at Contact Lights

13. The contact lights furnished by the defendant had fiber conduit at the bottom to lead the wire into the light sockets. The drawings showed this fiber conduit as extending from the base of the light along a 180° angle, parallel to the center line of the runway, which, if used, would have required a trench from each side of the light to the parallel trench 7 feet outside the runway. The specifications have an addendum as follows:

"IV–A. *Installation on concrete pads:* 1. On contracts
34 where the contractor has on hand a surplus of steel conduit, steel conduit may be substituted for the fibre duct and the concrete envelope specified on Drawing ANC–1014."

Plaintiff had on hand sufficient 90° steel conduit which he used in place of the fiber conduit which was furnished by the defendant with the light fixtures. Using these bends on the lights allowed both wires to come into the lights on the side away from the runway and obviated the necessity of bending the fiber conduit furnished with the lights to meet the cable in the trench. The defendant did not require plaintiff to furnish the bends and they were used by plaintiff of its own volition to simplify the work.

Install 1¼" Conduit

14. Contract item 3.12 (b) required the installation of wire and steel 1-inch conduit at a unit price of 60 cents per lineal foot. The cable furnished to go in this conduit was of such over-all diameter that difficulty was experienced in placing two such cables in the 1-inch conduit. The plaintiff was requested to furnish 1¼-

inch conduit for the work, and plaintiff was paid at the price of 65½ cents for 469 feet of 1¼-inch conduit in lieu of 1-inch conduit, and for 150 feet of 1-inch conduit at the unit price of 60 cents per foot. The 150 feet paid for at 60 cents per foot was actually 1¼-inch conduit, and the difference in price would amount to $7.15 for this 150 feet. The evidence establishes that a total of 490 feet was installed, for which the plaintiff was paid for 469 feet only, making a total of 21 additional feet for which the plaintiff has not been paid. The amended contract price for this 21 feet was $13.76. Plaintiff was underpaid for this item in the amount of $20.91.

Install Steel Supports for Transformers

15. The specifications attached to the contract required that six transformers, to be furnished by the Government and installed by the plaintiff, be installed in the vaults with expansion bolts. When plaintiff was building the concrete vaults for these transformers, no detailed information or templates showing the location of the expansion bolts were available to plaintiff, so plaintiff built the vaults without inserting the expansion bolts before pouring the concrete. When the transformers were furnished, it was found that they had been furnished without supporting bands. Plaintiff was directed to procure bands and drill holes in the concrete sides in which to place the expansion bolts. The Government recognized a liability for failure to furnish supporting bands with the transformers and actually paid the plaintiff $3 each for six such bands. The evidence does not establish a fair and reasonable price for furnishing the bands, but it does establish that 12 such bands were furnished.

Install Overhead Wire

16. At the northeast end of runway No. 3 the Government directed that overhead wires be installed in place of buried cable. The wire was furnished by the Government and the plaintiff performed the work. The Government computed a fair and reasonable price for the performance of this work as $18.14. The evidence fails to establish that this price was less than a fair and reasonable price.

Chipping Macadam Pavement Around Contact Light Pads

17. The outer edges of the macadam runway around which plaintiff was to install the contact lights were not in a line parallel to the center line of the runway. The defendant's engineer staked out the location of the lights along this runway, and plaintiff, in order to place the center of the lights at the designated points,

was required to chip away the irregular macadam edges. The installation of the lights at the places marked required the chipping away of from four to six inches of the macadam in the case of most of the lights. A fair and reasonable price for this work was $329.16. Plaintiff was not paid anything extra for this work. Had the runway been constructed with regular edges parallel to the axis of the runway, the lights could have been installed adjacent to the runway as shown on the drawings without the necessity for this chipping. A careful investigation of the edges of the runway, if it included removing the dirt or sod adjacent, would have disclosed the irregular edges. The staking out of the location for the lights was done after the contract was signed.

36 Repairs to Ceiling Light

18. While excavating trenches along the line indicated by the Government engineer, the plaintiff's excavating machine cut a buried cable which controlled the ceiling light. Thereafter plaintiff excavated in this location by hand labor, but the cable light was cut in approximately three places. Plaintiff made the necessary splices and restored the ceiling light to operation. The location of the buried cable to the ceiling light was not indicated on the plans nor was it obvious on the ground. However, after the cable had first been cut, plaintiff's attention was called to a slight indentation in the ground and was advised that this marked the trench in which the buried cable was located. The excavation made necessary to repair the ceiling light cable was allowed as a part of the extra excavation. The contract price for the splices was $16 each.

Smoothing and Grading Around Lights

19. After the lights around the runways were installed, it was found that the areas immediately surrounding the lights were lower than the previous grade along the sides of the runway. This resulted from the excavations which plaintiff made to install the lights. When the excavation was in process, the earth excavated was cast outward, and after the lights were installed this earth was not all brought back to its former location. As a result, surface water did not drain away from the areas of the lights. Plaintiff was required to smooth out the obstructions to the drainage so as to restore the area to the condition it was in before excavating for the lights. Plaintiff performed this work at an approximate cost of $200.

Exception List

20. Inspection of the project was made on December 10, 1944, and plaintiff was notified of certain small items which were not in conformity with the specifications. Plaintiff corrected all such nonconformities. The cost of doing this is not established by the evidence.

37 Interference and Delay

21. The contract was completed sufficiently to permit the lights to be turned on by November 18, 1944, which was one day after completion date, and thereafter plaintiff performed certain minor items of contract work, including certain extras ordered, with two or three men up to December 10, when the final inspection was held. Thereafter plaintiff did additional work in connection with the items to which exception had been taken. The painting of certain poles and one or two other minor items was by agreement postponed until the following spring.

During the performance of the contract considerable extra work was ordered by the defendant and the estimated quantities of work were exceeded in many cases. This work required the extra time.

For about two or three weeks there was a shortage of cable for the work, but during such time plaintiff was engaged in other work on the contract.

Plaintiff was not delayed in the completion of work except for the overrun on the contract items and the extra work ordered.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand eight hundred ten dollars and ninety-two cents ($3,810.92).

Opinion

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff entered into a contract with the defendant through the Civil Aeronautics Administration for the construction of a lighting system at Port Erie Airport, Erie, Pennsylvania. Plaintiff says that defendant's measurements of the work done at unit prices were incorrect in a number of different instances,

38 and that in other instances the unit price fixed for the work done was too low, and in other instances the price paid for extra work ordered was too low.

We find it unnecessary to comment on each and every item. Suffice it to say that we have carefully reviewed the commissioner's report and the exceptions thereto taken by both the plaintiff and the defendant, and, except in the instances noted below, we are of the opinion that the weight of the evidence is not against the commissioner's findings, and we have, accordingly, adopted his findings, with only minor exceptions.

The contract required the installation of obstruction lights on poles, some of which were to be double lights. The defendant, however, was unable to obtain double lights, but furnished instead two single lights where a double light was required. The work of assembling these two single lights so as to make a double light was the defendant's responsibility, but the plaintiff volunteered to do this work with its own workmen. This was acquiesced in by the defendant. Since this was the defendant's responsibility and it permitted the plaintiff to do the work, the defendant is liable for the payment of reasonable compensation therefor. We have found that $16.00 is reasonable compensation.

In finding 7 we have found that plaintiff was not paid for 676 feet of cable placed in the trenches. The commissioner found that plaintiff had not been paid for 644 feet, but he made no allowance for slack in the cable, which has been computed at 5 percent, making a total of 676 feet.

In finding 10 we have adopted the commissioner's finding of $8.00 a lineal foot as a fair and reasonable price for driving the conduits under 12th Street and Ford Avenue. The plaintiff at first submitted a bid for $32.00, but there was no agreement on this price. We are of opinion that the $4.00 allowed by the defendant is too low, and that $8.00 is a reasonable price for doing this work.

Plaintiff makes claim for the cost of the 90° bends which it used instead of the fiber conduit furnished by the defendant to enclose the wires from the lights to the cable in the trench. Under the specifications plaintiff was permitted to substitute steel conduits for the fiber conduits. It had on hand the steel conduits and found it easier to do the work by using them
39 than to use the fiber conduits furnished by the Government. It used the 90° steel conduits of its own volition, and not at the order of the defendant and it is not entitled to recover for the cost of them.

In finding 17 we have found that the fair and reasonable price for chipping macadam off the edges of the runway was $329.16, instead of the commissioner's figures of $444.56. It appears that

the commissioner figured this cost at $4.22 a light for 78 lights, but in doing so he made an error in calculation, the correct figure being $329.16 instead of $444.56.

In excavating the trenches the plaintiff cut a buried cable which controlled the ceiling light. The location of this buried cable was not shown on the plans and it was not obvious on the ground. However, after it had been cut, defendant's engineer on the job called to plaintiff's attention an indentation in the ground which he said indicated the trench in which the cable for this ceiling light had been buried. After this had been called to plaintiff's attention, it was easy to follow the course of the trench. However, plaintiff cut this cable five times thereafter. It is entitled to compensation for repairing it as a result of the first cutting because the location of it was not shown, but it is not entitled to recover the subsequent cuttings of it, because by the exercise of due care this could have been avoided.

Plaintiff is not entitled to recover for the cost of smoothing and grading around the lights. This was made necessary because plaintiff in excavating for trenches piled up the dirt in such a way as to prevent the water from draining from the lights. It was a part of its duty to restore the land around these lights to its previous grade, and it is not entitled to compensation for doing so.

The contract was completed one day after the completion date. This extra day was made necessary on account of the extras ordered by the defendant. Plaintiff, however, says it could have completed the work earlier had the defendant not interfered with it. We find no evidence of interference. Nor was it any part of defendant's duty to make it possible for plaintiff to complete its work prior to the completion date. United States v. Blair, 321 U. S. 730.

40 As shown by the findings, we conclude that there is due the plaintiff the sum of $3,810.92, which is composed of the following items:

Cost of assembling lights (finding No. 4)	$16.00
6" x 18" trench excavation not paid for (finding No. 5)	447.33
Trenches in excess of 6" x 18" not paid for (finding No. 6)	2,130.00
Cable in trench, not paid for (finding No. 7)	13.52
Cable splices (findings 8 and 18)	16.00
Driving conduit under road (finding No. 10)	400.00
Furnishing and installing poles (finding No. 12)	420.00
1¼" conduit not paid for (finding No. 14)	20.91
Supporting bands for transformers (finding No. 15)	18.00
Chipping macadam (finding No. 17)	329.16
Total	3,810.92

Judgment for this amount will be entered. It is so ordered.

HOWELL, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

41 *Judgment of the court*

October 3, 1949

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand eight hundred ten dollars and ninety-two cents ($3,810.92).

43 *Proceedings after entry of judgment*

On October 24, 1949, defendant filed a motion for a new trial.

On November 7, 1949, the court filed an order overruling defendant's motion for a new trial.

On December 19, 1949, on motion made therefor and allowed by the court, defendant filed its second motion for a new trial.

On April 3, 1950, the court filed the following opinion on defendant's motion for a new trial.

45 *On defendant's motion for a new trial*

April 3, 1950

WHITAKER, Judge, delivered the opinion of the court:

The Government filed a motion for a new trial in this case, which we overruled. It then filed a motion for leave to file a second motion for a new trial, asserting that the issues in this case and in the case of Moorman v. United States, 113 C. Cls. 159, then pending in the Supreme Court on certiorari to this court, were the same, and requesting that if its motion for leave to file a second motion was granted, that it be held in abeyance until the Supreme Court's decision in the Moorman case.

We granted the defendant's motion, and the Supreme Court has now decided the Moorman case, 338 U. S. 457.

Defendant says that the Moorman decision, as well as others, precludes us from overruling a finding of the contracting officer made in good faith, and that since his findings in this case are against the plaintiff, they preclude recovery.

The Moorman case involved the conclusiveness of the findings of the contracting officer on the question of the interpretation of the contract and specifications. In this case we are concerned only with the conclusiveness of his findings on questions of fact. His findings on questions of fact are alleged to be binding upon us in this case.

46 It has been said many times that findings of fact of a contracting officer, affirmed on appeal, are conclusive, unless the evidence shows he acted arbitrarily or capriciously or that his decisions were so grossly erroneous as to show bad faith.

This exception to the conclusiveness of his findings was first expressed by the Supreme Court, so far as we know, in Burchell v. Marsh, 17 Howard 344, 349. It was reiterated in Kihlberg v. United States, 97 U. S. 398; in United States v. Gleason, 175 U. S. 588, 602; in Ripley v. United States, 223 U. S. 695, 701, and in Merrill-Ruckgaber v. United States, 241 U. S. 387, and in others.

However, for his decision to be conclusive it must have been rendered "with due regard to the rights of both the contracting parties" (Ripley v. United States, supra, p. 701). In that case the court said:

"But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties."

In other words, the contracting officer must act impartially in settling disputes. He must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge. If the evidence shows he has failed so to act, there can be no doubt that we have jurisdiction to set aside his decision. Northern Pacific Railway Co. v. Twohy Bros. Co., 95 F. (2d) 220, 225; Anderson v. Imhoff, et al., 34 Neb. 335, 51 N. W. 854, 856.[1] The duty to act impartially was imposed upon him by the contract. If we are convinced he has failed to discharge this contractual obligation, then his decision cannot have that finality provided for in the contract, and we are free to decide the case as we see it.

Some contracting officers regard themselves as representatives of the defendant, charged with the duty of protecting its in-
47 terests and of exacting of the contractor everything that may be in the interest of the Government, even though no reasonable basis therefor can be found in the contract documents; but the Supreme Court has said that in settling disputes this is not his function; his function, on the other hand, is to act impartially, weighing with an even hand the rights of the parties on the one hand and on the other.

So, when a case comes before us in which the contracting officer rules against the contractor, and there is no substantial basis

[1] In the case last cited the court said:
"• • • If, however, the arbitrator so chosen should refuse to perform the duties required of him, or should collude with either of the parties, and thereby render an unjust award, the adverse party would not be bound by a decision so rendered. It is a fundamental principle in considering awards that fraud, partiality, or wilful misconduct of the arbitrator will be a sufficient cause for setting the award aside. • • •"

in the contract to support his ruling, or no substantial evidence to support it, or when his decision is grossly erroneous, we can hardly conclude that he has acted impartially; we can hardly say that he has been faithful to his duty to render impartial decisions; or, to paraphrase the language of prior decisions, that he has acted in good faith. We have said this same thing before. See the well considered discussion of this question in an opinion delivered for the court by Judge Littleton in Needles v. United States, 101 C. Cls. 535, 600–607, and see also Loftis v. United States, 110 C. Cls. 551, 630, et seq., and Mitchell Canneries v. United States, 111 C. Cls. 228, 247, and cases cited in these opinions.

We are always loath to say that a governmental official has acted in bad faith. Indeed in the many cases that have come before this court there have been but very few instances in which we have found, or thought, that the contracting officer was unfaithful to the Government. Their fidelity is beyond reproach. But it often happens that they misconceive their function. Faithful to the Government they almost always are, but frequently they are lacking in impartiality. And, yet, this is the duty the dispute clause of the contract (article 15) casts upon them.

It is a duty not easily to be discharged, we know. They are the Government's representatives, charged with the duty of seeing that the Government gets what it bargained for. Many contractors, on the other hand, bent upon making as much money as they can out of the contract, are constantly seeking ways out of doing this and doing that. Frequently, it is a constant battle—the contracting officer as the Government's representative, on the one hand, and the contractor on the other. To ask the contracting officer to act impartially when he must decide a dispute between the contractor and his employer is, indeed, putting upon
48 him a burden difficult to bear. And yet the contract requires him to do so.

So, if any case we say that the contracting officer has not acted in good faith, we mean only that he has not in good faith discharged his duties as an impartial, unbiased judge. We do not at all mean to impugn his fidelity to his employer. Indeed, it is this fidelity to his employer that makes it so difficult for him to act impartially.

We take it, then, that in deciding whether or not the contracting officer's decisions are conclusive upon us, we must decide whether or not he has acted without bias and impartially. If so, they are binding; if not, they are not binding.

In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of

his findings, his relationship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him.

With these considerations in mind, we pass to the issues raised on the motion for a new trial.

In our opinion in this case rendered October 3, 1949, we gave the contractor judgment on account of ten different items. Two of the items were for extra work not ordered in writing. We were in error in awarding judgment for them, for the reason, as defendant points out in its motion for a new trial, that they were not ordered in writing, as required by article 5 of the contract. These two items were the cost of assembling lights, $16.00, and the cost of chipping macadam, $329.16.

Five of the other items were on account of errors made by the contracting officer in computing the quantities for which plaintiff was entitled to payment at unit prices. The contracting officer found that the plaintiff had dug 23,855 lineal feet of 6″ x 18″ trench; we found that plaintiff had in fact dug 27,296 lineal feet, or 3,441 lineal feet more than the contracting officer had found. We also found that the plaintiff had placed in the trenches 35,071 feet of cable, whereas the contracting officer computed 34,395 feet, a difference of 676 feet. We think the contracting officer was in error as to these two items.

49 The contracting officer found that the plaintiff had excavated only 203 cubic yards of trenches measuring more than 6″ x 18″, whereas, in fact, as we found, the contractor had excavated 629 cubic yards of such trenches. This was three times the amount found by the contracting officer. The defendant does not undertake to explain how the contracting officer, in making his computation, could have made so gross an error, one of more than 300 per cent.

The contract required plaintiff to install certain poles, which plaintiff offered in its bid to install for $70.00 a pole. At this price the total amount of plaintiff's bid seems to have brought the total cost of the work above the figure defendant's agents were authorized or wished to spend, and plaintiff was requested to reduce its price for the installation of these poles to $35.00 a pole, upon the representation that the Government had determined that no poles at all would be required. Plaintiff, on this assurance, agreed to do so. Later, it was determined that certain poles had to be installed and plaintiff was directed to install them. It submitted an invoice therefor, based upon its original bid of $70.00 a pole, but defendant refused to pay it more than $35.00 a pole, the token figure submitted by plaintiff at the Government's request.

On account of certain changes in the plans it became necessary to install a two-inch conduit under 12th Street and Ford Avenue, two of the boundary lines of the airfield. Plaintiff was ordered in writing to do this work and was requested to submit a bid therefor. Plaintiff did the work and then submitted a bid of $32.00 a lineal foot, which seems to have been an excessive price. The defendant refused to pay this price, and asked for a further proposal. The parties were never able to get together on the price to be paid and the contracting officer then fixed a $4.00 a lineal foot as the amount to be paid. The evidence establishes, and we have found, that a fair and reasonable price for doing this work was $8.00 a lineal foot, which was twice the amount allowed by the contracting officer.

50 The other items for which we rendered judgment are smaller in amount and give no indication of arbitrary action on the part of the contracting officer.

We think, however, that it is impossible to conclude that the contracting officer had acted impartially and with due regard to the rights of the plaintiff in determining that it was entitled to only $35.00 a pole for the number of poles installed, whereas plaintiff had bid $70.00 therefor and had reduced its price to $35.00 only because the contracting officer had represented that no poles were to be installed, and that he desired the reduction only to bring the cost of the work within the limits prescribed. We cannot but conclude that that decision was an arbitrary one and was rendered without any regard for plaintiff's rights or of the equities involved. Having induced plaintiff to reduce its bid from $70.00 a pole to $35.00 a pole, upon the representation that no poles were to be installed, it comes close to being unconscionable to have awarded plaintiff only $35.00 a pole for those which it later turned out had to be installed, contrary to expectations.

Again, we cannot conclude that the contracting officer acted fairly and impartially and with due regard to plaintiff's rights when he found that the amount of excavation of trenches measuring more than 6″ x 18″ was less than one-third of that actually done. Nor can we believe that he could have acted impartially when he found that the fair price of driving the conduit under 12th Street and 4th Avenue was only one-half of what we have determined was a fair price, and only one-eighth of the amount of plaintiff's original bid.

In view of his action on these three items, we are forced to conclude that he did not act with due regard to plaintiff's rights, that he did not act as an impartial, unbiased arbiter, and that his decision, therefore, must be held to have been arbitrary and capricious, and lacking in that good faith required of an unbiased, impartial arbiter.

The contracting officer's decision on all the items for which we rendered judgment was rendered at the same time. From the record as a whole we are convinced that the biased attitude which was evident in the instances which we have cited affected
51 his decision upon all the items of the claim. We therefore reaffirm the judgment heretofore rendered, with the sole exception of the extras not ordered in writing, to wit, the cost of assembling lights, $16.00, and the cost of chipping macadam, $329.16.

Defendant's motion for a new trial is allowed. The former judgment is withdrawn and judgment will now be rendered for $3,465.76.

The findings will be amended by adding a new finding at the conclusion to read as follows:

"22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith."

HOWELL, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

53 *Final judgment of the court*
April 3, 1950

Defendant's motion for a new trial is allowed. The former judgment is withdrawn and judgment will now be rendered for $3,465.76.

The findings will be amended by adding a new finding at the conclusion to read as follows:

"22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith."

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand four hundred sixty-five dollars and seventy-six cents ($3,465.76).

55 [Clerk's Certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1950

SUPREME COURT OF THE UNITED STATES

No. 170—October Term, 1950

Order allowing certiorari filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 170

THE UNITED STATES, PETITIONER

v.

PENNER INSTALLATION CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on April 3, 1950.

OPINIONS BELOW

The original opinion of the Court of Claims (R. 23-25) is reported at 114 C. Cls. 571. The supplemental opinion of the Court of Claims (R. 26-31) is reported at 89 F. Supp. 545.

JURISDICTION

The original judgment of the Court of Claims was entered on October 3, 1949 (R. 26). The Gov-

ernment's motion for a new trial, seasonably filed, was denied on November 7, 1949 (R. 26). The Government's motion for leave to file a second motion for new trial was allowed on December 19, 1949 (R. 26). On April 3, 1950, the Court of Claims granted the Government's motion for a new trial, withdrew its judgment of October 3, 1949, and entered a new judgment (R. 31). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the decision of a designated agent of the Government on disputes arising out of a contract, which decision the contract provides "shall be final and conclusive upon the parties thereto", may be set aside as "arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith" on the basis of (1) an assumed presumption that the decision lacked impartiality because the designated agent was an employee of one of the parties to the contract and (2) the finding, predicated solely on the evidence before the court without reference to the evidence before the designated agent when he made his decision, that the decision was erroneous.

CONTRACT PROVISION INVOLVED

Article 15 of the contract provides:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this con-

> tract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

STATEMENT

Penner Installation Corporation, respondent herein, instituted this proceeding in the Court of Claims seeking to recover $20,139.59 on a number of claims arising under a unit-price contract, which it had entered into with the Civil Aeronautics Board for furnishing certain materials and performing certain installation work for an airport lighting system at Port Erie Airport, Erie, Pennsylvania. In its complaint, respondent alleged that the claims asserted had been presented to the contracting officer and duly appealed to the Secretary of Commerce, but "that the defendant has failed and refused to pay said claims" (R. 3). Respondent, however, made no allegation that the actions of the contracting officer and the Secretary of Commerce, in rejecting its claims, were arbitrary, capricious or so grossly erroneous as to imply bad faith.

In its special findings, the Court of Claims found, *inter alia*, that pursuant to Article 15 of the contract (*supra*, pp. 2-3), respondent submitted to the contracting officer an itemized statement of the

amount claimed to be due (R. 16). The contracting officer granted an allowance on a few of the claims and rejected the remainder which included the items of claim involved in the suit. On appeal by the respondent, the Secretary of Commerce sustained the decision of the contracting officer (R. 16). The court, however, made no finding as to whether the actions of the contracting officer and the head of the department were arbitrary or so grossly erroneous as necessarily to imply bad faith nor did it make any subsidiary finding as to what evidence was before these officers at the time they acted. Instead, the court below made findings on the merits of the claims. The court agreed with the administrative disposition of some of the claims, and refused to allow recovery thereon (R. 24-25). On ten claims, however, the court found that it disagreed with the administrative disposition thereof.[1] On the basis of this disagreement,

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[1] The substance of the court's findings on the eight claims on which it ultimately awarded damages to respondent follows:

(1) On the 6″ x 18″ trench, the court found that the evidence before it established that respondent had excavated a total of 27,296 lineal feet, that respondent had been paid for only 23,855 lineal feet, an underpayment of 3,441 lineal feet, and that $447.33 was due respondent (R. 17).

(2) On cable trench in excess of 6″ x 18″, the court found on the evidence before it that respondent excavated 629 cubic yards, which is 426 cubic yards more than the 203 for which respondent was paid. $2,130.00 was held to be due respondent (R. 17).

(3) On cable in trench, the court found that on the evidence before it 35,071 feet was actually placed. Since

the court initially held that the sum of $3,810.42 was due respondent (R. 25) and entered judgment for that amount (R. 26). In its opinion, the court stated (R. 24):

> We find it unnecessary to comment on each and every item. Suffice it to say that we have carefully reviewed the commissioner's report and the exceptions thereto taken by both the

---

respondent was paid for only 34,395 feet, the court held that respondent was entitled to payment for 676 feet and awarded $13.52 (R. 18).

(4) The court awarded respondent $16.00 for one of the cable splices for which respondent had not been paid. The other five cable splices were, the court found, caused by respondent's own fault (R. 18).

(5) On driving conduit under road, the court found that respondent had submitted a price of $32.00 per lineal foot, but later formally agreed to do the work for $6.00 a foot. Although the respondent was claiming $35.80 a foot and the CAB had fixed a price of $4.00 a foot, the court held that $8.00 was a fair and reasonable price and awarded $400.00 (R. 18-19).

(6) On furnishing and installing wood poles, the court found that respondent originally bid $70.00 a pole, but reduced it to $35.00 a pole at the Government's request when told that no poles would be required. Subsequently, respondent was directed to furnish 12 poles varying in length between 18 and 30 feet. The court further found that under the winter conditions under which the work was done, a fair price was $70.00 a pole and awarded $420.00 (R. 19).

(7) On the 1¼" conduit, the court found that respondent installed 150 feet of 1¼" conduit but was paid for 1" conduit, in accordance with the contract, and awarded $7.15. The court further found that a total of 490 feet was installed but respondent was paid for 469 feet. The court awarded $13.76 for the additional 21 feet (R. 20-21).

(8) On supporting steel bands, the court found on the evidence before it that respondent procured and installed 12, rather than the six bands for which it had been paid, and awarded $18.00 for the unpaid six bands (R. 21).

> plaintiff and the defendant, and, except in the instances noted below, we are of the opinion that the weight of the evidence is not against the commissioner's finding, and we have, accordingly, adopted his findings, with only minor exceptions.

The Government's motion for a new trial called the court's attention to the fact that its allowance of recovery conflicted with the provisions of Article 15 since there was no finding that the decision of the head of the department on these claims was arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith. That motion was denied on November 7, 1949 (R. 26). Subsequently on December 19, 1949, the court below granted the motion of the United States for leave to file a second motion for new trial, in which it was urged that this Court's disposition of *United States* v. *Moorman*, Oct. Term, 1949, No. 97, which was then pending on writ of certiorari would control here (R. 26). This Court entered its opinion in the *Moorman* case, 338 U. S. 457, on January 9, 1950. The court below, on April 3, 1950, withdrew its original judgment and granted the Government's motion for a new trial (R. 31). In its supplemental opinion simultaneously entered, the court, without further proceedings, reaffirmed its original judgment, except with regard to two claims involving extras not ordered in writing, thus allowing respondent to recover $3,465.76 (R. 31).

The court concluded its opinion by amending its findings to add a new finding (R. 31);

> 22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith.

REASONS FOR GRANTING THE WRIT

In *United States* v. *Moorman*, 338 U. S. 457, 462, this Court stated that an agreement between contracting parties "to submit their contractual disputes to final determination outside the courts" should not "be frustrated by judicial 'interpretation' of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." So reasoning, this Court upheld the finality of an administrative ruling on a dispute under a government contract, noting that it had been represented to the Court, in the Solicitor General's petition for certiorari, that the Court of Claims' decision in *Moorman* plus previous decisions had " 'weakened and narrowed the effectiveness of the well-established policy of the Government to settle, without expensive litigation, disputes arising under contracts'; and that the total effect of the decisions was to 'add further doubt and confusion to the authority of designated officers of the United States

to make final decisions under government contracts.' " 338 U. S. at 460.[2]

In *Moorman*, this Court recognized that the contractually designated agent's findings could, of course, be " 'impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith.' "[3] And so, within three months of this Court's *Moorman* decision, the Court of Claims, in reconsidering the case at bar, seized upon the exception to the rule of administrative finality, having initially ignored the rule altogether, despite the facts (1) that no issue as to the question of fraud or such gross mistake as necessarily implied bad faith was presented by the pleadings, (2) the case was not tried upon such issues, and (3) no finding was made as to the evidence upon which the contracting officer and the Secretary of Commerce acted.

The Court of Claims, in this case, found no actual bias. But, it said (R. 28-29), "In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relation-

[2] See, *e.g.*, *McShain* v. *United States*, 88 C. Cls. 284, reversed *per curiam*, 308 U. S. 512, 520; *Callahan Walker* v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56; *Blair* v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730; *Beuttas* v. *United States*, 101 C. Cls. 748, reversed, 324 U. S. 768; *Holpuch* v. *United States*, 104 C. Cls. 254, reversed, 328 U. S. 234; *Moorman* v. *United States*, 113 C. Cls. 159, reversed, 338 U. S. 457.

[3] Quoting from *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 555.

ship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him." And in considering these factors, the court concluded that a finding of bad faith was required in this case.

The Government believes it to be demonstrable that this formula, as given practical application in this case, converts what was intended as an exception to the rule of administrative finality into the prevailing rule. If the decision below is permitted to stand, there is every reason to anticipate a recurrence of the situation which led this Court to grant certiorari in the *Moorman* case. See *supra*, pp. 7-8.[4] If that is so, this Court, in the exercise of its supervisory powers, should grant certiorari in this case.

1. Since the designated agent in the government contract is employed by the Government, owes allegiance to the Government, and the duties of his employment require him to protect the interests of the Government, the decision below effectively creates a presumption that the designated agent acted in bad faith, a presumption which can be rebutted only if his decision is found to be correct by the Court of Claims on the evidence before it. But it has long been established that the fact

[4] That the instant case marks the beginning of a line of cases, in which the doctrine herein announced will be applied, is evidenced by the opinion of the court below in *The Great Lakes Dredge and Dock Company* v. *The United States*, No. 45658, decided June 5, 1940 (slip opin., pp. 4-5).

that the person designated to decide the disputes arising under the contract is an employee of one of the parties to the contract does not entitle his decisions to any less finality than that accorded decisions of designated agents not so employed. *United States* v. *Moorman*, 338 U. S. 457, 461. See, aso, *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 U. S. 618; *United States* v. *Gleason*, 175 U. S. 588; *Ripley* v. *United States*, 223 U. S. 695; *Plumley* v. *United States*, 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *United States* v. *McShain, Inc.*, 308 U. S. 512, 520; cf. *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 326; *Burchell* v. *Marsh*, 17 How. 344; *Knox* v. *Symmonds*, 1 Ves. Ch. Rep. 369. No such differentiation is made where the Government is not a party to the contract (see *Martinsburg & Potomac RR. Co.* v. *March*, 114 U. S. 549; *Chicago & Sante Fe Railroad* v. *Price*, 138 U. S. 185; *Mundy* v. *Louisville & N. R. Co.*, 67 Fed. 633, 644 (C. A. 6); *Ranger* v. *Great Western Railway Co.*, 5 HL Cas. 72) and there is even less basis for such a distinction when the Government is a contractual party. There, unlike the arbiters in purely private contracts, the designated agents "are also public officials who, as such, are presumably worthy of trust, and they have no financial interest in the questions which may arise under the contract which interest would cause them not to be impartial." *Bein* v. *United States*, 101 C. Cls. 144, 168 (Madden, J. concurring).

Moreover, the court below erroneously assumes throughout its opinion that the decision of the contracting officer controls. But Article 15 clearly provides for an appeal from the contracting officer's decisions to the head of the department, and it is the latter's decisions to which finality attaches. The head of the department, in contrast to the contracting officer, is not immediately concerned with the day by day performance of the contract and is in a position to take a more objective view of the merits of the dispute. It is because of this very reason that Article 15 requires an appeal to the department head. *United States* v. *Blair*, 321 U. S. 730, 734-737; *United States* v. *Holpuch*, 328 U. S. 234, 239-240.

In addition, the presence *vel non* of mere error in the designated agent's decision is irrelevant in determining whether to accord it finality. Were the decision to be final only if correct, there would be little purpose in including the finality provision in the contract, for then it would not operate to reduce the volume of potential litigation which would result from such disputes. As this Court has long recognized, it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto. "* * * it was expressly stipulated that the [designated agents'] determination should be final and conclusive. Neither party reserved the right to revise that determination for mere

errors or mistakes upon his part." *Martinsburg & Potomac RR. Co.* v. *March,* 114 U. S. 549, 554; *Chicago & Sante Fe Railroad* v. *Price,* 138 U. S. 185, 193; *Ripley* v. *United States,* 223 U. S. 695, 704; *Burchell* v. *Marsh,* 17 How. 344, 349-350; *Knox* v. *Symmonds,* 1 Ves. Ch. Rep. 369.

Finally, the ruling below ignores the plain language and obvious intent of the finality provision, which as it stands, makes binding all decisions of the designated agent. Subject to the "arbitrary or capricious" limitation, such provisions, it has long been established, are valid and enforceable; "parties competent to make contracts are also competent to make such agreements." *United States* v. *Moorman,* 338 U. S. 459, 461. In addition, the finality provision is of great value to the Government and "it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority [to make binding decisions]." *Kihlberg* v. *United States,* 97 U. S. 398, 401. Clearly therefore this Court in using the strong language of "arbitrary," "capricious" and "so grossly erroneous as necessarily to imply bad faith" regarded the limitation as one to be invoked but sparingly,[5] and not to be used as an easy

[5] "If a court in which the contractor seeks relief can justify its taking hold of the case only by applying such strong language as 'arbitrary,' 'capricious,' 'so grossly erroneous as to imply bad faith,' then the contractor has a nearly impossible burden if he seeks relief in court. Public officials who become heads of departments and contracting officers are only rarely

formula permitting the contractor to avoid the terms of his bargain. Courts are "competent to go back of the judgment of the [designated agent] * * * only * * * upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith." *United States* v. *Gleason*, 175 U. S. 588, 607; see, also, *Martinsburg & Potomac RR. Co.* v. *March*, 114 U. S. 549, 553, 555; *Elliott* v. *Missouri, K. & T. Ry. Co.*, 74 Fed. 707, 711 (C. A. 8).

2. (a) It is obvious that the finding of such "gross error" in disposing of a dispute, which error "necessarily" gives rise to the inference of bad faith on the part of the designated agent, must be predicated upon an appraisal of the evidence which the agent had before him at the time he acted. That evidence may be either more, less or completely different from that which is before the court. A man cannot act in bad faith by failing to accord weight to evidence which he never saw or heard; likewise the reviewing court is not in a position to conclude that the agent's decision was so grossly erroneous as necessarily to imply bad faith if the evidence upon which the agent based his decision is unknown to the court. Here the

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guilty of conduct which merits such language of condemnation. Hence, unless courts merely use the strong language when in fact they mean something else, as, e.g., that they are unable to see any evidence of any substantial weight to sustain the official's decision, the administrative determination under Article 15 is final in practically all cases." Madden, J. concurring in *Bein* v. *United States*, 101 C. Cls. 144, 168.

court below failed to make any finding whatsoever as to the evidence before the designated agent.[6] In so doing it ignored the decision of this Court in *Ripley* v. *United States*, 220 U. S. 491. There, although the Court of Claims had found that the Government's designated agent had improperly refused to allow the imposing of crest rocks on a jetty at a time when "it was manifest" that the conditions for performing that work were satisfied, this Court returned the record to the Court of Claims "to explicitly find whether or not that which [the court] states was manifest was or was not known to the inspector." 220 U. S. at 496. See, also, *Ripley* v. *United States*, 222 U. S. 144, 147-148; *Burchell* v. *Marsh*, 17 How. 344, 349-350. Similarly, had the court below here tested the designated agent's rulings against the matters known to him, the court might well have concluded that his rulings were not so grossly erroneous as to warrant implying bad faith, notwithstanding the fact that these rulings might have so seemed in the light of the more elaborate and possibly different evidence before the court.

(b) Even on the basis of the findings of the court below and without considering either the evidence before it or before the Secretary of Com-

[6] Indeed, it is doubtful if it could have done so. No allegation of bad faith was made by respondent in its petition and the case was not tried on that theory. This underscores the necessity of alleging bad faith as stressed by this Court in *United States* v. *Gleason*, 175 U. S. 588, 607, and *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553.

merce, the decision below as to bad faith in respect of at least five items is erroneous as a matter of law. In respect of those items the court below admitted, in its opinion, that they were small in amount and "give no indication of arbitrary action on the part of the contracting officer" (R. 30). In so far as the other three items are concerned, the court concluded from its findings that the contracting officer "did not act as an impartial, unbiased arbiter and that his decisions, therefore, must be held to have been * * * lacking in that good faith required of an unbiased, impartial arbiter."[7] The court then proceeded to apply a wholly novel theory of "guilt by association". It stated that "we are convinced that the biased attitude, which was evident in the circumstances which we have cited, affected his decision upon all the items of the claims" (R. 31).

Apart from the fact that there is nothing in the court's findings to support this statement in the opinion (*United States* v. *Callahan-Walker Co.*, 317 U. S. 56, 59; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205-206; 303 U. S. 26, 28-29; *United States* v. *Causby*, 328 U. S. 256, 267-268),

[7] Should certiorari be granted, we will demonstrate that even on the basis of the court's findings on these three items, there is no showing of such gross error as to imply bad faith. Thus in respect of the conduit under 12th Street and Ford Avenue, the respondent had submitted a price of $32.00 per lineal foot, had later agreed to accept $6.00 and was ultimately paid $4.00. The court below fixed a price of $8.00. Even in the absence of the evidence before the designated agents, it is apparent that their conduct in this respect falls far short of establishing gross error.

the court's refusal to accept the designated agent's rulings on the three items is, as we have already noted, based not on actual bias, but an imputation of bias or bad faith derived from the errors in regard thereto which it found he had committed. Assuming that the errors in the three items were so gross as to warrant an imputation of bad faith, it does not follow that such implied bad faith permeated the five claims as to which such gross error was not found to have been committed. On the contrary, the designated agent, far from rejecting all, allowed some of respondent's claims (cf. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656) and the court below recognized the propriety of these rejections by itself denying recovery on the bulk of the claims asserted. By entering judgment for respondent for only about $3,500 in the face of respondent's claim for about $20,000, the court below made it manifest that the court itself did not believe that the designated agent's "bias" tainted all his actions on respondent's claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1950.

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AUG 17 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term—1950

No. 170

THE UNITED STATES,

Petitioner,

—v.—

PENNER INSTALLATION CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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M. CARL LEVINE, MORGULAS & FOREMAN,
On the Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 170

THE UNITED STATES,

Petitioner,

—v.—

PENNER INSTALLATION CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition of the Government proceeds upon the erroneous premise that gross mistake and bad faith were not presented by the pleadings, nor was the case tried upon that premise (Petition, page 8).

The Claim of Respondent as filed in the Court of Claims specifically alleged in paragraph 6 (R. 1 & 2), "That the defendant breached and violated the terms of the contract, in that it *arbitrarily, unlawfully* • • •; *arbitrarily* and *unreasonably* classified various items of work *erroneously* and *failed* and *refused* to pay • • •; *deliberately* withheld payments • • •; *deliberately underpaid claimant* and *underestimated the amount and value* of the labor performed and materials furnished • • •. (Italics ours.)

The case was tried on this theory, the correspondence from Claimant to the Government and all the appeals to the Head of the Department were on this theory.

It was only because of the arbitrary, unreasonable, unlawful acts, bad faith and gross error on the part of the Government, that respondent was granted a judgment.

The Court of Claims made a specific finding to that effect, stating (R. 31):

> "22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith."

The Supreme Court has consistently held that the findings of the Court of Claims are binding, final and conclusive on the Supreme Court.

In *U. S.* v. *Esnault-Pelterie*, 303 U. S. 26, after discussing general method of appeal and the fact that findings are conclusive, stated at page 29 and 30:

> "* * * the findings of the Court of Claims 'are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope.' *Brothers* v. *U. S.*, 250 U. S. 88, 93; *Stilz* v. *U. S.*, 269 U. S. 144, 147, 148; *U. S.* v. *Esnault Pelterie, supra* (299 U. S. 20). The requirement that the Court of Claims should find the ultimate facts which are controlling, places upon the Court the duty of resolving conflicting inferences and to draw from the evidence the necessary conclusions of fact. *U. S.* v. *Adams*, 6 Wall 101, 102. Even though the finding determines a mixed question of law and fact, the finding is conclusive unless the court is able 'to so separate the question as to see clearly what and

where the mistake of law is.' *Ross* v. *Day*, 232 U. S. 110, 117; *U. S.* v. *Omaha Indians*, 253 U. S. 275, 281; *Stilz* v. *U. S., supra; U. S.* v. *Swift & Co.*, 270 U. S. 124, 138."

and at page 31,

"We must take the findings of fact as made below."

So, too, in *U. S.* v. *Causby*, 328 U. S. 256, at 268:

"We do not stop to examine the evidence to determine whether it would support such a finding, if made. For that is not our function. *U. S.* v. *Esnault Pelterie, supra* (303 U. S. 26) p. 206."

In the case of *Luckenback S. S. Co.* v. *U. S.*, 272 U. S. 533 this court stated at 538-539:

"This Court uniformly has regarded the legislation and rules as confining the review to questions of law shown by the record when made up as the rules direct. Bills of exception are not recognized in either the legislation or the rules; nor is there other provision for bringing the evidence into the record or including therein the various rulings involved in applying to the evidence presented the rules which mark the line between what properly may be considered and what must be rejected. As long ago as *Mahon* v. *U. S.*, 14 Wall 109, 111, this Court said of the rules that they could not be examined 'without seeing that the purpose was to bring nothing here for review but questions of law, leaving the Court of Claims to exercise the functions of a jury in finding facts, equivalent to a special verdict and with like effect.' "

So, too, in *Chesapeake & Potomac Telephone Co.* v. *U. S.*, 281 U. S. 385 at 388:

> "It seems to us that the dissent of two of the Judges of the Court below is directed rather to the findings than to the statement of the law upon the findings as they stand. These are not open to question before us."

In the instant case the contract specifically limits decisions of the Contracting Officer and Head of the Department to questions of fact (Contract, Article 15; R. 10). It is different from the *Morman* case in that important respect.

In the *Morman* case, no finding was made to the effect that the decision of the Contracting Officer and Head of the Department were arbitrary and so grossly erroneous as to imply bad faith. As stated by this Court in the *Morman case*:

> "Findings of such a contractually designated agent, even where employed by one of the parties, were held 'conclusive, *unless impeached on the ground of fraud, or gross mistake as necessarily implied bad faith.*'
>
> "The holdings of the foregoing cases have never been departed from by this Court." (Italics ours.)

This Court therefore recognized the fact that even with the broad clause in the *Morman* case, a finding that the actions of the Contracting Officer and Head of the Department were arbitrary and so grossly erroneous as to imply bad faith, would have entitled the claimant to relief. This is the express finding of the Court of Claims in the instant matter.

One need only to look at the testimony in this case to be convinced of the absolute arbitrariness, unreasonableness and gross erroneousness and the patent bad faith of the defendant's representatives.

The conclusive fact of defendant's bad faith is the fact that although the airport was delivered complete, even by defendant's own arbitrary requirements on April 7, 1945, the Government took until December, 1945 before it made payment to the Contractor. The Contractor contended that its job was completed in November, 1944. No excuse was offered by the Government's witnesses for this delay, except the fact that they were annoyed that claimant had the temerity to question their acts.

So too, we find throughout the entire record absolutely no evidence ever being offered by the defendant as to any quantities or value of items claimed by the plaintiff. Defendant did not even take the trouble to check plaintiff's claims or plaintiff's amounts, and at no time questioned the fairness or reasonableness of these amounts.

With regard to other items allowed by the Court, the opinion of the Court bears out the unreasonableness and bad faith. In the matter of the poles, the Court points out the fact that the testimony is uncontroverted that the defendant represented and warranted to the plaintiff that no poles would be required, and induced the plaintiff, for defendant's own record purposes, to put in a nominal unit price for the poles, and then added poles to the contract and required plaintiff to furnish the poles at these fraudulently induced prices (R. 30).

We do not wish to burden the Court with a recitation of all the testimony, but it is a fair statement to make that all the other items which plaintiff claimed were handled by the defendant in the same manner.

The Court of Claims has expressly made the finding of arbitrariness, gross error and bad faith, which was lacking in the *Morman* case. This finding being final and conclusive on this Court, it is respectfully submitted that there is no basis, warrant or justification for any review, as no novel question is being raised and the petition should be denied.

Respectfully submitted.

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On the Brief

arbitrarily, capriciously or decisions so gross erroneous as to show bad faith

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 170

THE UNITED STATES, PETITIONER

v.

PENNER INSTALLATION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the Court of Claims (R. 23–25) is reported at 114 C. Cls. 571. The supplemental opinion of the Court of Claims (R. 26–31) is reported at 89 F. Supp. 545.

JURISDICTION

The original judgment of the Court of Claims was entered on October 3, 1949 (R. 26). The Government's motion for a new trial, seasonably filed, was overruled on November 7, 1949 (R. 26). The Government's motion for leave to file a second motion for new trial was allowed on December 19, 1949 (R. 26). On April 3, 1950,

the Court of Claims granted the Government's motion for a new trial, withdrew its judgment of October 3, 1949, and entered a new judgment (R. 31). The petition for a writ of certiorari was filed on June 30, 1950, and was granted on October 9, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the decision of a designated agent of the Government on disputes arising out of a contract, which decision the contract provides "shall be final and conclusive upon the parties thereto," may be set aside as "arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith" on the basis of (1) a presumption created by the court below that the decision lacked impartiality because the designated agent was an employee of one of the parties to the contract, and (2) the finding, predicated solely on the evidence before the court without reference to the evidence before the designated agent when he made his decision, that the decision was erroneous.

CONTRACT PROVISION INVOLVED

Article 15 of the contract provides (R. 10):

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the

head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

STATEMENT

On September 28, 1944, Penner Installation Corporation, respondent herein, entered into a unit-price contract (R. 4–14) with the United States through the Civil Aeronautics Administration for furnishing certain materials and performing certain installation work for an airport lighting system at Port Erie Airport, Erie, Pennsylvania. Article 15 of the contract (*supra*, pp. 2–3), a standard provision for the administrative determination of disputes, provided that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto." After unsuccessfully invoking the machinery which the contract prescribed for the final settlement of disputes, respondent instituted this proceeding in the Court of Claims seeking to recover $20,139.59 on a number of claims arising under the contract. In its complaint (R. 1–3), Penner alleged that defendant's

[the United States'] measurements of the work done at unit prices were incorrect in a number of instances, that in other instances the unit price fixed for the work done was too low, that in still other instances the price paid for extra work ordered was too low. Penner further alleged that the claims asserted had been presented to the contracting officer and duly appealed to the Secretary of Commerce, but "that the defendant has failed and refused to pay said claims" (R. 3). There was no allegation, however, that the actions of the contracting officer and the Secretary of Commerce, in rejecting the claims, were arbitrary, capricious or so grossly erroneous as to imply bad faith.[1]

In its special findings, the Court of Claims found, *inter alia,* that pursuant to Article 15 of the contract (*supra,* pp. 2–3), respondent submitted to the contracting officer an itemized statement of the amount claimed to be due (R. 16). The contracting officer granted an allowance on a few of the claims and rejected the remainder which included the items of claim involved in this suit (R. 16). On appeal by the respondent, the Secretary of Commerce sustained the decision of the contracting officer (R. 16). The court made no finding, however, as to whether the actions of the contracting officer and the head of the department were arbitrary or so grossly erroneous as necessarily to imply bad faith nor did it make

[1] See *infra*, note 9, p. 24.

any subsidiary finding as to what evidence was before these officers at the time they acted. Instead, the court below made findings on the merits of the claims. In its opinion, the court stated (R. 24):

> We find it unnecessary to comment on each and every item. Suffice it to say that we have carefully reviewed the commissioner's report and the exceptions thereto taken by both the plaintiff and the defendant, and, except in the instances noted below, we are of the opinion that the weight of the evidence is not against the commissioner's findings, and we have, accordingly, adopted his findings, with only minor exceptions.

The court agreed with the administrative disposition of most of the claims, and refused to allow recovery thereon (R. 24–25). On ten claims, however, the court found that it disagreed with the administrative disposition thereof.[2] On the basis of this disagreement, the court initially held that the sum of $3,810.42 was due respond-

[2] The substance of the court's findings on the eight claims on which it ultimately awarded damages to respondent follows:

(1) On the 6″ x 18″ trench, the court found that the evidence before it established that respondent had excavated a total of 27,296 lineal feet, that respondent had been paid for only 23,855 lineal feet, an underpayment of 3,441 lineal feet, and that $447.33 was due respondent (R. 17, 25).

(2) On cable trench in excess of 6″ x 18″, the court found on the evidence before it that respondent exca-

ent (R. 25) and entered judgment for that amount (R. 26).

The Government's motion for a new trial called the court's attention to the fact that its allowance of recovery conflicted with the provisions of Article 15 since there was no finding that the decision of the head of the department on these claims was arbitrary, capricious or so grossly er-

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vated 629 cubic yards, which is 426 cubic yards more than the 203 for which respondent was paid. $2,130.00 was held to be due respondent. (R. 17, 25.)

(3) On cable in trench, the court found that on the evidence before it 35,071 feet was actually placed. Since respondent was paid for only 34,395 feet, the court held that respondent was entitled to payment for 676 feet and awarded $13.52. (R. 18, 25.)

(4) The court awarded respondent $16.00 for one of the cable splices for which respondent had not been paid. The other five cable splices were, the court found, caused by respondent's own fault. (R. 18, 25.)

(5) On driving conduit under road, the court found that respondent had submitted a price of $32.00 per lineal foot, but later formally agreed to do the work for $6.00 a foot. Although the respondent was claiming $35.80 a foot and the CAB had fixed a price of $4.00 a foot, the court held that $8.00 was a fair and reasonable price and awarded $400.00. (R. 18–19, 25.)

(6) On furnishing and installing wood poles, the court found that respondent originally bid $70.00 a pole, but reduced it to $35.00 a pole at the Government's request when told that no poles would be required. Subsequently, respondent was directed to furnish 12 poles varying in length between 18 and 30 feet. The court further found that under the winter conditions under which the work was done, a fair price was $70.00 a pole and awarded $420.00. (R. 19, 25.)

(7) On the 1¼" conduit, the court found that respondent installed 150 feet of 1¼" conduit but was paid

roneous as necessarily to imply bad faith. That motion was overruled on November 7, 1949 (R. 26). Subsequently on December 19, 1949, the court below granted the motion of the United States for leave to file a second motion for new trial, in which it was urged that this Court's disposition of *United States* v. *Moorman*, Oct. Term, 1949, No. 97, which was then pending on writ of certiorari would control here (R. 26).

After this Court's decision in the *Moorman* case, 338 U. S. 457, the court below, on April 3, 1950, withdrew its original judgment and granted the Government's motion for a new trial (R. 31). In its supplemental opinion simultaneously entered, the court stated that "In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him" (R. 28–29). The court concluded that a

for 1" conduit, in accordance with the contract, and awarded $7.15. The court further found that a total of 490 feet was installed but respondent was paid for 469 feet. The court awarded $13.76 for the additional 21 feet. (R. 20–21, 25.)

(8) On supporting steel bands, the court found on the evidence before it that respondent procured and installed 12, rather than the six bands for which it had been paid, and awarded $18.00 for the unpaid six bands (R. 21, 25).

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consideration of these factors compelled a finding of bad faith in this case, and thus ended its opinion by amending its findings to add a new finding (R. 31):

> 22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith.

The court then reaffirmed its original judgment, except with regard to two claims involving extras not ordered in writing, thus allowing respondent to recover $3,465.76, instead of $3,810.42 (R. 31).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that arbitrariness and bad faith could be imputed to the decisions of the government arbiters because of error in the decision and because of the fact that they were agents of the Government.

2. In holding that the decisions of the government officers were arbitrary and so grossly erroneous as to imply bad faith, in the absence of circumstantial findings sufficient to warrant such conclusion.

3. In failing to find what evidence was before the government arbiters at the time they acted on respondent's claim.

4. In concluding that the decisions of the government officers were so grossly erroneous as to imply bad faith, although bad faith of the officers was not alleged.

5. In assuming that the decisions of the contracting officer, rather than that of the Secretary of Commerce, were final.

6. In holding on the basis of its findings that fraud or such gross error as to necessarily imply bad faith on the part of the government officers had been established.

7. In entering judgment for respondent in the sum of $3,465.76.

SUMMARY OF ARGUMENT

Construction contracts entered into between the United States and a contractor usually contain, as here, a provision that disputes arising under the contract shall be settled by a designated officer or agent of the Government. It is well settled that the decisions of that officer or agent are binding and conclusive upon the parties to the contract, and may be set aside by the courts only for the most grave reasons, only "on the ground of fraud, or such gross mistake as necessarily implied bad faith." *United States* v. *Moorman*, 338 U. S. 457, 461. In setting aside the decisions of the arbiter designated by the contract here, the Court of Claims made no finding of actual fraud or bias. Rather, it imputed bad faith to the contracting officer on the basis of (1) his relationship to the parties, the allegiance he owes the Government, his duties of employment, and (2) the alleged errors in his findings. Such a formula disregards the specific terms of the contract and the consistent decisions of this Court.

I

A. It is well established that the fact that the arbiter is an employee of one of the parties to the contract does not entitle his decisions to any less finality than the decisions of designated agents not so employed. It was not competent, therefore, for the court below to consider the fact that the contracting officer was an agent of the Government and owed allegiance to the Government. To consider the relationship between the arbiter and the Government can only result in creating a presumption that the arbiter acts in bad faith. But the presumption established by the decisions is that the designated agent acts in good faith. And this is especially true when he is a Government official and has no personal financial interest in the matter.

The court below erred, moreover, in assuming that the decision of the contracting officer controlled. The contract clearly provided that the decision of the head of the department was to be final. In contrast to the contracting officer, the head of the department is not immediately concerned with the day-by-day performance of the contract and is in a position to take a more objective view of the merits of the dispute.

B. The presence *vel non* of mere error in the arbiter's decision is irrelevant in determining whether to accord it finality. It was plainly contemplated by the parties that the designated

agent would make erroneous rulings but that mere error would not be sufficient to set aside the decision. As this Court has long recognized, there would be little purpose in including the finality provision in the contract were the arbiter's decision to be final only if correct. Under the decisions of this Court, the error must be so gross as necessarily to imply bad faith. As will appear, that is not the case here.

II

The court below made no findings whatsoever as to the evidence before the contracting officer or the department head. But, plainly, bad faith cannot be imputed to those officers without an appraisal of the evidence and facts upon which they acted.

III

A. Passing the failure of the court below to determine what evidence was before the contract arbiters, the facts stated in the opinion of the Court of Claims do not, in any event, establish mistakes so gross as to require an inference of bad faith on their part. Moreover, the court's conclusion that the administrative awards with respect to three items were grossly erroneous is not supported by evidentiary findings. The failure of the court below to "include circumstantial facts sufficient to warrant the court's conclusion in respect of the main issues"

(*United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205–206) constitutes reversible error.

B. The administrative disposition of the remaining five claims was not even deemed by the court below to be grossly erroneous; the rulings on those items were set aside solely as a consequence of the wholly unwarranted attribution by the court below to the rulings on these items of the bad faith found with respect to the other three.

ARGUMENT

It is, and at least since *Kihlberg* v. *United States*, 97 U. S. 398, and *Sweeney* v. *United States*, 109 U. S. 618, has been, settled law that where the United States and a contractor agree that certain decisions shall be made or disputes settled by a designated officer or agent of the Government, the decision of that officer or agent is binding and conclusive upon the parties to the contract. The decisions so made may not be reviewed judicially for the purpose of correcting any errors therein[3] and may be set aside only "on the ground of fraud, or such gross mistake

[3] In recent years, the Court of Claims has evidenced an inhospitable attitude toward this doctrine and has endeavored to qualify it so as sharply to circumscribe the finality of the decisions of the designated officer. See, *e. g.*, *McShain* v. *United States*, 88 C. Cls. 284, reversed *per curiam*, 308 U. S. 512, 520; *Callahan Walker* v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56; *Brooks-Calloway Co.* v. *United States*, 97 C. Cls. 689, reversed, 318 U. S. 120; *Blair* v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730; *Beuttas* v. *United States*,

as necessarily implied bad faith." *Martinsburg & Potomac R. Co.* v. *March,* 114 U. S. 549, 555. As recently as last term, this Court, in *United States* v. *Moorman,* 338 U. S. 457, 462, reasserted the binding effect of such an agreement and, while holding that the intention to make such an agreement "should be made manifest by plain language," observed that that did "not mean that hostility to such provisions can justify blindness to the plain intent of parties to adopt this method for settlement of their disputes." It cautioned that an agreement between contracting parties "to submit their contractual disputes to final determination outside the courts" should not "be frustrated by judicial 'interpretation' of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government" (*ibid.*).

Before the decision of this Court in the *Moorman* case, the instant case had been decided by the Court of Claims adversely to the Government and a motion for a new trial had been overruled. In the original opinion (R. 23–25), there is no discussion whatsoever of the decisions of this

101 C. Cls. 748, reversed, 324 U. S. 768; *Halpuch* v. *United States*, 104 C. Cls. 254, reversed, 328 U. S. 234; *Moorman* v. *United States*, 113 C. Cls. 159, reversed, 338 U. S. 457.

Court requiring that finality be accorded to the decision of the contracting officer, and, when those decisions were specifically urged upon the court below in the motion for a new trial, that motion was overruled without comment (R. 26). Admittedly, this case involves disputes as to matters of fact only (R. 26) and had the Government sought, and this Court granted, certiorari in that posture of the case, the judgment below would undoubtedly have been reversed on the basis of the long line of decisions making the determination of the designated governmental official final and binding. While the *Moorman* case was pending before this Court, however, the Government filed a motion for leave to file a second motion for a new trial in which it was pointed out that a decision favorable to the Government in the *Moorman* case would *a fortiori* require a reversal of the judgment here. Leave was granted to file that motion and a motion for a new trial was duly filed (R. 26).

Following the decision of this Court in the *Moorman* case, the court below, on April 3, 1950, granted the Government's second motion for a new trial, entered a new opinion and judgment, and added one finding of fact (R. 31), namely that "The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith." The court below made no other

findings nor did it modify any of the findings that it had theretofore made in any way. With the exception of two minor items of claim, disallowed on the ground that the additional work was not ordered in writing (R. 29, 31), the court below reaffirmed its prior holding on the ground that the decision of the designated officers must be disregarded as they were arbitrary and so grossly erroneous as to imply bad faith.

The opinion below explains the reasoning by which the court reached this conclusion. It held that "the contracting officer must act impartially in settling disputes" (R. 27); that government contracting officers are almost always faithful to the Government but "frequently they are lacking in impartiality" (R. 28); that they "are the Government's representatives, charged with the duty of seeing that the Government gets what it bargained for" (R. 28), and that "the officer's fidelity to his employer * * * makes it * * * difficult for him to act impartially" (R. 28). The court then proceeded to lay down what it considered to be the appropriate standard. It stated: "In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him"

(R. 28–29). Applying the doctrine which it had just enunciated to the facts which it had found in the instant case, the court below held that, because it found what it conceived to be serious error in the decisions of the contracting officer, the actions of that officer were "arbitrary and capricious, and lacking in that good faith required of an unbiased, impartial arbiter" (R. 30).

We submit that this new standard set up by the court below to determine whether the action of the contracting officer is so arbitrary and capricious or grossly erroneous as necessarily to imply bad faith, finds no support in the decisions of this Court which have laid down a much narrower rule, and, further, that the court below has failed to make necessary evidentiary findings to support its ultimate finding of arbitrariness and bad faith.

I

THE RULING OF THE DESIGNATED OFFICER MAY BE SET ASIDE ONLY FOR FRAUD OR SUCH GROSS MISTAKE AS WOULD NECESSARILY IMPLY BAD FAITH.

The decisions of this Court have repeatedly set forth the sole ground on which a ruling or determination made by a designated officer may be set aside. With slight variations of language, that ground is stated to be "fraud, or such gross mistake as *necessarily* implied bad faith." [Italics supplied.] *United States* v. *Moorman*, 338 U. S. 457, 461; *Kihlberg* v. *United States*,

97 U. S. 398, 402; *Sweeney* v. *United States,* 109 U. S. 618, 620; *Martinsburg & Potomac R. Co.* v. *March,* 114 U. S. 549, 555; *United States* v. *Gleason,* 175 U. S. 588, 602; cf. *Chicago and Santa Fe RR Co.* v. *Price,* 138 U. S. 185, 195; *Ripley* v. *United States,* 223 U. S. 695, 701.

In so far as the instant case is concerned, we can put to one side actual fraud or its equivalents, "bias," "lack of an honest judgment," or "bad faith," established as a result of direct proof.[4] The court below made no finding whatsoever that there was actual fraud or bias in the instant case. It did make a finding that the decisions of the contracting officer and the head of the department were arbitrary (R. 31). In its second opinion it held that the contracting officer "did not act as an impartial, unbiased arbiter, and that his decision, therefore, must be held to have been arbitary and capricious, and lacking in that good faith required of an unbiased, impartial arbiter" (R. 30). But there is no intimation in either the findings or the opinion that the court's holding that the contracting officer acted arbitrarily and in bad faith stemmed from anything

[4] Compare, *e. g., Ripley* v. *United States,* 222 U. S. 144, 147, where this Court remanded the case to the Court of Claims for an unequivocal finding of good or bad faith rather than gross mistake; *United States* v. *Blair,* 321 U. S. 730, 736, where the Court of Claims had found that the acts of the government agents at the site of the work were so unreasonable that the contractor could not take the administrative appeals without subjecting itself to reprisals.

other than the fact that the contracting officer was a government employee and that his decision was, in the opinion of the court below, clearly wrong in several factual aspects. To the contrary, its opinion is replete with disclaimers of an intent to attribute actual fraud or bias to government officials charged by contract with this important function.

The remaining elements thus left available to the court below under its formulated doctrine for determining impartiality and good faith of the arbiter fall into two groups: (1) The officer's relationship to the parties, the allegiance he avows and the duties his employment by one of them casts upon him, and (2) the correctness of his findings. We submit that this formula, which, in the final analysis, depends upon whether the court below finds error in the decision of the arbiters, so far fails to measure up to the standards set forth by this Court that it should be specifically disapproved.

A. THE EMPLOYMENT OF THE ARBITER BY ONE OF THE PARTIES TO THE CONTROVERSY IS NOT A PROPER ELEMENT TO BE CONSIDERED IN IMPEACHING THE CORRECTNESS OF HIS RULING

To give consideration and weight to the nature and type of employment of the arbiter under government contracts where the question of bad faith is involved, would effectively destroy the intended efficacy of the finality provisions of such contracts. Since the arbiters designated in stand-

ard government contracts are always employed by the Government, always owe allegiance to the Government, and the duties of their employment always require them to protect the interests of the Government, the decision below plainly creates a presumption of bad faith rebuttable only by a showing that the arbiter is guilty of serious error in no respect. But it has long been established that the fact that the person designated to decide the disputes arising under a contract is an employee of one of the parties to the contract does not entitle his decisions to any less finality than that accorded decisions of designated agents not so employed. *United States* v. *Moorman,* 338 U. S. 457, 461; *Goltra* v. *Weeks,* 271 U. S. 536, 548. See, also, *Kihlberg* v. *United States,* 97 U. S. 398; *Sweeney* v. *United States,* 109 U. S. 618; *United States* v. *Gleason,* 175 U. S. 588; *Ripley* v. *United States,* 223 U. S. 695; *Plumley* v. *United States,* 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387; *United States* v. *McShain, Inc.,* 308 U. S. 512, 520; cf. *United States* v. *Mason & Hanger Co.,* 260 U. S. 323, 326; *Burchell* v. *Marsh,* 17 How. 344; *Knox* v. *Symmonds,* 1 Ves. Ch. Rep. 369. No such differentiation is made where the Government is not a party to the contract. See *Martinsburg & Potomac RR. Co.* v. *March,* 114 U. S. 549; *Chicago & Santa Fe Railroad* v. *Price,* 138 U. S. 185; *Mundy* v. *Louisville & N. R. Co.,* 67 Fed. 633, 644 (C. A.

6); *Ranger* v. *Great Western Railway Co.*, 5 HL Cas. 72.

A presumption of honesty attaches to the selected arbiter (*United States* v. *Gleason, supra,* p. 607; *Elliott* v. *M. K. & T. R. R. Co.,* 74 Fed. 707, 712 (C. A. 8)), not a presumption of bias. Indeed there is an even greater basis for presuming impartiality and good faith when a government official is the arbiter. *Ogden* v. *United States,* 60 Fed. 725, 726–727 (C. A. 5). For, unlike the arbiters under private contracts, the designated agents "are also public officials who, as such, are presumably worthy of trust, and they have no financial interest in the questions which may arise under the contract which interest would cause them not to be impartial." *Bein* v. *United States,* 101 C. Cls. 144, 168 (Madden, J. concurring).

Moreover, the court below erroneously assumes throughout its opinion that the decision of the contracting officer controls. Article 15, however, clearly provides for an appeal from the contracting officer's decisions to the head of the department, and it is to the latter's decisions that the contract accords finality. The head of the department, in contrast to the contracting officer, is not immediately concerned with the day by day performance of the contract and is in a position to take a more objective view of the merits of the dispute. It is for this very reason

that Article 15 requires an appeal to the department head and this Court has held that it is a method well calculated to correct arbitrary and erroneous rulings and decisions of subordinate officials. *United States* v. *Blair,* 321 U. S. 730, 734–737; *United States* v. *Holpuch,* 328 U. S. 234, 239–240. Yet the court below, without any discussion and without any finding other than the conclusory one that his decision was arbitrary and so grossly erroneous as to imply bad faith, has set aside and disregarded the decision of the department head here involved.[5]

We submit that the presumption, indulged in by the court below, to the effect that governmental agents are presumably prejudiced in favor of the Government when they are cast in the role of the arbiters, and that that presumption is to be accorded weight in evaluating their good faith when their decision is subjected to judicial review, has no basis in law or in fact and should be rejected.

B. THE FACT THAT THE FINDING OF THE DESIGNATED OFFICER IS INCORRECT DOES NOT, WITHOUT MORE, INVALIDATE HIS RULING

Under the formula adopted by the court below there must be weighed, secondly, "the correctness

[5] In *United States* v. *Blair,* 321 U. S. 730, 736, the Court remarked that we "cannot on this record attribute to the departmental head the alleged unreasonable attitude of his subordinates." The record here affords even less grounds for so doing.

of his [the contracting officer's] findings." We submit that that factor is entitled to no weight as such. The presence of mere error in the designated agent's decision is irrelevant in determining whether to accord it finality. Were the decision to be final only if correct, there would be little purpose in including the finality provision in the contract, for then it would not operate to reduce the volume of potential litigation which would result from such disputes.[6] As this Court has long recognized, it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto. "* * * it was expressly stipulated that the [designated agents'] determination should be final and conclusive. Neither party reserves the right to revise that determination for mere errors or mistakes upon his part." *Martinsburg & Potomac RR. Co.* v. *March*, 114 U. S. 549, 554; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185, 193; *Ripley* v. *United States*,

[6] Such a course would effectively destroy the value of a "finality" provision in a contract. As this Court has said, "the contract did not contemplate that the opinion of the court should be substituted for that of the engineer." *Ripley* v. *United States*, 223 U. S. 695, 704. Arbitrators should not be treated "as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion." *Burchell* v. *Marsh*, 17 How. 344, 350. See also *Ogden* v. *United States*, 60 Fed. 725, 727 (C. A. 5).

223 U. S. 695, 704; *Burchell* v. *Marsh*, 17 How. 344, 349–350; *Knox* v. *Symmonds*, 1 Ves. Ch. Rep. 369.

We do not contend, of course, that there can never be an error so gross, or a ruling so arbitrary, as to support an ultimate finding of bad faith. But it is significant that so far as we have been able to discover, this Court has never set aside the findings of a contracting officer on the sole ground that his mistake was so gross as necessarily to imply bad faith.[7] It is obvious from the language repeatedly emphasized by this Court (see cases cited *supra*, pp. 16–17), that the mistake must have been so outrageous and the proof thereof so irrefutable and overwhelming that no reasonable person could reach any conclusion other than that the contracting officer acted in bad faith. See *Choctaw & M. RR. Co.* v. *Newton*, 140 Fed. 225, 234 (C. A. 8), certiorari denied, 202 U. S. 620. The phrase "such gross mistake as *necessarily* implied bad faith"[8] can only mean that the error must be so gross as to compel an inference of bad faith and must be the equivalent of the bad faith which might be proved by more direct evidence. But the record in this case does not even permit such an inference, let alone compel it. See *infra*, pp. 24–33.

[7] See note 4, *supra*, p. 17.

[8] *United States* v. *Moorman*, 338 U. S. 457, 461 (italics supplied).

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223 U. S. 695, 704; *Burchell* v. *Marsh,* 17 How. 344, 349–350; *Knox* v. *Symmonds,* 1 Ves. Ch. Rep. 369.

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[7] See note 4, *supra,* p. 17.

[8] *United States* v. *Moorman,* 338 U. S. 457, 461 (italics supplied).

II

THE COURT OF CLAIMS' CONCLUSION OF BAD FAITH ON THE PART OF THE GOVERNMENT ARBITERS CANNOT STAND SINCE THAT COURT MADE NO FINDINGS AS TO WHAT EVIDENCE WAS BEFORE THE OFFICIALS AT THE TIME OF THE ADMINISTRATIVE DETERMINATION.

The Court of Claims made no finding as to what evidence the contracting officer had before him at the time he made his determination. Nor is there any finding as to the record which was before the head of the department at the time he affirmed the decision of the contracting officer.[9] We submit that the failure of the court below to

[9] This highlights the need of alleging and proving "fraud, or such gross mistake as necessarily implied bad faith" so often stressed by this Court. *United States* v. *Gleason*, 175 U. S. 588, 607–608; cf. *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393. Such an element was a necessary part of respondent's case. See *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 326; *City of Lexington* v. *Pratt*, 31 F. 2d 820, 821 (C. A. 4); *Breyman* v. *Ann Arbor R. Co.*, 85 Fed. 579, 586 (C. C. N. D. Ohio). Respondent, in its brief in opposition (p. 1), contends that the allegations of its petition in the Court of Claims raised this issue, that the case was tried on this issue in the court below and that the head of the department considered the appeal on this theory. But allegations that the United States breached the contract "in that it arbitrarily, unlawfully * * * required the claimant to perform and furnish labor and materials not called for by said contract * * *; arbitrarily and unreasonably classified various items of work erroneously * * *; deliberately underpaid claimant," etc. (R. 1–2), are nothing more than a general allegation of wrongful breach of contract. They are no substitute for an allegation that the

make these essential evidentiary findings completely invalidates its ultimate finding of arbitrariness and bad faith.

It is obvious that a finding of "gross error", which error "necessarily" gives rise to the inference of bad faith on the part of the designated agent, must be predicated upon an appraisal of the evidence which the agent had before him at the time he acted. That evidence may be either more, less, or completely different from that which is before the court. A man cannot act in bad faith by failing to accord weight to evidence which he has neither seen nor heard; likewise the reviewing court is not in a position to conclude that the agent's decision was so grossly erroneous as necessarily to imply bad faith if the evidence upon which the agent based his decision is unknown to the court. Here the court below failed to make any finding whatsoever as to the evidence before the designated agent. In so doing, it ignored the decision of this Court in *Ripley* v. *United States,* 220 U. S. 491. There, although the Court of Claims had found that the Government's designated agent had improperly refused to allow the imposing

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government officers made their decision fraudulently or in bad faith, or that they made an error so gross as to imply bad faith. The original findings and opinion of the Court of Claims rather clearly show that the case was neither tried nor decided on the theory of fraud or gross mistake (R. 23–24).

of crest rocks on a jetty at a time when "it was manifest" that the conditions for performing that work were satisfied, this Court returned the record to the Court of Claims "to explicitly find whether or not that which [the court] states was manifest was or was not known to the inspector." 220 U. S. at 496. See, also, *Ripley* v. *United States,* 222 U. S. 144, 147–148; *Burchell* v. *Marsh,* 17 How. 344, 349–350. Similarly, had the court below here tested the designated agent's rulings against the matters known to him, the court might well have concluded that his rulings were not so grossly erroneous as to warrant implying bad faith, notwithstanding the fact that these rulings might have seemed so in the light of the more elaborate and possibly different evidence before the court.

III

THE FINDINGS OF THE COURT FAIL TO ESTABLISH ERROR SO GROSS AS NECESSARILY TO IMPLY BAD FAITH IN RESPECT OF THE CLAIMS WHICH THAT COURT ALLOWED.

The special findings of fact of the court below are inadequate to establish gross mistake or error on the part of the contracting officer or the head of the department. As we have shown above, the court below failed to find what evidence was before the arbiters. It may well be that on the basis of the evidence before them their findings were correct and thus there was no error, much less gross error. But even assuming that the evi-

dence before the arbiters and the court below was identical, the findings below do not sustain the judgment.

A. THERE WAS NO BAD FAITH WITH RESPECT TO THE RULINGS ON THREE ITEMS SPECIFICALLY HELD TO BE GROSSLY ERRONEOUS

In its opinion, the court below found the decisions of the contract arbiters to be incorrect with respect to eight items and specifically discussed them. As to three main items, the court concluded that the contracting officer "did not act as an impartial, unbiased arbiter and that his decisions, therefore, must be held to have been * * * lacking in that good faith required of an unbiased, impartial arbiter" (R. 30). But the facts before the court in respect of these three items were not "sufficient to overcome the presumptions of honesty, trustworthiness, and faithful discharge of duty which surround the report of the chosen arbiter of the disputes of these parties" (*Elliott* v. *Missouri, K. & T. R. R. Co.*, 74 Fed. 707, 715 (C. A. 8)), or to establish "such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment". *Kihlberg* v. *United States*, 97 U. S. 398, 402.

Thus, in respect of the conduit under 12th Street and Ford Avenue, the respondent had submitted a price of $32.00 per lineal foot, had later agreed to accept $6.00 and was ultimately paid $4.00 by the United States (Fndg. 10, R. 18–19).

The court below fixed a price of $8.00 (R. 19, 30). When, as here, the respondent had freely agreed to accept from the Government an amount 50% closer to the sum finally tendered by the Government than the amount awarded by the Court of Claims, we submit that it cannot successfully be contended that the proof of error is so "overwhelming, or persuasive beyond a reasonable doubt, or free from all doubt and convincing, or so outrageous" as to justify setting aside the decision of the contracting officer and the Secretary of Commerce. *Choctaw & M. R. R. Co.* v. *Newton,* 140 Fed. 225, 234 (C. A. 8), certiorari denied, 202 U. S. 620.

Nor do the facts in respect to the claim concerning the excavation of trenches measuring more than 6" x 18" (Fndg. 6, R. 17), and the claim concerning the furnishing and installing of wooden poles (Fndg. 12, R. 19–20) furnish the basis for imputing bad faith to the contracting officer. While, in respect to the excavation, a great disproportion appeared between the amount excavated and the amount paid for, that fact, without more, is insufficient basis for an inference of bad faith. And though the court's opinion states that "the defendant does not undertake to explain how the contracting officer, in making his computation, could have made so gross an error * * *" (R. 29), that is not the fact, as the Government's request for special findings, a

copy of which has been filed with the Clerk of this Court, demonstrates.[10] Similarly, the court's conclusion as to the wood poles, considered in the light of the Government's argument with respect

[10] With respect to the excavation of trenches here in question, the Government had this to say (pp. 69–70): "Cable Trench in Excess of 6″ x 18″ Contract Item 3.141(d) (Finding 6)

"Plaintiff claimed underpayment on the item of trench excavation in excess of 6″ x 18″. This trenching apparently arose from certain hand trenching that had to be done in the areas underlaid with cables, and in searching for ducts under taxiways. Plaintiff has apparently claimed also the 'excess' dug by the larger trenching machine over a regular 6″ x 18″ trench. As noted above the use of this machine was by the choice of the contractor. The proof fails to establish underpayment, although the Commissioner finds underpayment for 426 cubic yards.

"Spec. 405–3, addendum No. 1 (Pltf. Ex. 1) states that excess trenching will be considered only when the number of cables installed in that trench exceed two and are spaced at 3″ intervals. There was no showing under this item of cables laid in excess of two.

"Stamberger (Tr. 384) and Penner (Tr. 61) note the presence on the job of the larger trenching machines on which part of this item of claim is based.

"Plaintiff's whole claim on this item is based on an unidentified and unexplained Exhibit 8. Very little interpretation of this exhibit could be made by defendant's witness (Tr. 385ff). Plaintiff never explained this exhibit, but speculation by defendant's witness is the most the Court has before it. Opposed to this is Deft. Ex. 8, pp. 56–57, which shows, for example, that final payment (Deft. Ex. 9) included 262′ of excavation in front of hangar and office. Plaintiff seems to be claiming for this (Stamberger, Tr. 386). Further inaccuracies are indeterminate. Clearly the proof fails to support the claim."

to them [11] is hardly a basis from which bad faith must necessarily be inferred.

[11] The Government's request for special findings had this to say with respect to the wood poles (pp. 74–75); "Furnishing and Installing Wood Poles Contract Item 3.12(o) (Finding 12)

"Plaintiff furnished and installed the following size wood poles on the job: 1–18′, 2–20′, 6–25′, 3–30′ (Stamberger, Tr. 556). The contractor was compensated for this work at $35.00 per pole.

"The contract contemplated the installation of an unspecified number of poles of 35′ and more in height. For the minimum height of 35′, the contractor bid $35.00 per pole.

"After the work was begun, CAA ordered the installation of the shorter poles and included the work in its Equalization Order 532 at $35.00 per pole, irrespective of height (items 3.12(o), 1–4 incl.). Plaintiff was paid this amount, which the proof does not show was unreasonable. Defendant has taken exception to the Commissioner's Finding of $70.00 per pole as a reasonable figure.

"Again, the Court is faced with the same problem as was CAA. That agency repeatedly asked the contractor for justification of his figures on this work, and only after protracted correspondence and conferences, it decided justly on the figure of $35.00 per pole irrespective of height, although all poles were less in height than the 35′ pole the contractor bid upon at $35.00 (DuLude Tr. 481).

"The contractor has shown no cost records to substantiate his claim, but says the figures in the petition represent the 'fair and reasonable value' of the work. But the Government's representative Stamberger, from his diary proved the exaggerated character of this claim (Stamberger, Tr. 551–561). Thus for example, Penner said he could never set more than four poles in a day (Penner, Tr. 119) but the diary entry of Stamberger shows 12 poles were set in one day, November 21 (Stamberger, Tr. 555–557).

"While the contractor made much of the snow and ground frozen a foot deep (Penner, Tr., 100) Stamberger's diary revealed no such conditions, although there were intermittent showers (Stamberger, Tr. 393)."

The court below may properly have found error; but the Government insists that the existence of such error did not warrant, much less compel an inference of bad faith.

We have, up to this point in this section of the argument, been discussing the criticisms made by the Court of Claims of the administrative rulings as if they were embodied in the court's findings. But that is not the case. The special findings state only that the arbiters were government employees and that their decisions, in some respects, were wrong. They contain no intimation that the actions of the contracting officer and of the Secretary of Commerce were arbitrary or so grossly erroneous as to imply bad faith. The additional finding, made on the motion for a new trial, that the arbiters' decisions were arbitrary and so grossly erroneous as to imply bad faith adds nothing. It was an ultimate finding, and, as such, it is fatally defective because it is not supported by evidentiary findings and does not "include circumstantial facts sufficient to warrant the court's conclusion in respect of the main issues." *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206. There is no subsidiary finding anywhere on which may be rested the ultimate finding of arbitrariness.

B. THE COURT BELOW ERRED IN ATTRIBUTING THE BAD FAITH IT INFERRED FROM THE ADMINISTRATIVE RULING ON THE PRECEDING THREE ITEMS TO THE RULINGS ON FIVE OTHER ITEMS

The court below committed plain error when it spread the bad faith which it inferred from rulings on three items over into five other items. With respect to these five items, the court below admitted, in its opinion, that they were small in amount and "give no indication of arbitrary action on the part of the contracting officer" (R. 30). The court referred to its finding of implied fraud with respect to the three items already mentioned, however, and stated that "we are convinced that the biased attitude which was evident in the circumstances which we have cited affected his decision upon all the items of the claim (R. 31).

Apart from the fact that there is nothing in the court's findings to support this statement in the opinion (*United States* v. *Callahan-Walker Co.*, 317 U. S. 56, 59; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205–206; 303 U. S. 26, 28–29; *United States* v. *Causby*, 328 U. S. 256, 267–268), the court's refusal to accept the designated agent's rulings on the three items is, as we have already noted, based not on actual bias, but an imputation of bias or bad faith derived from the errors in regard thereto which it found he had committed. Assuming that the errors in the three items were so gross as to warrant an imputation of bad faith, it does not follow that such

implied bad faith permeated the five claims as to which no such gross error was found. On the contrary, the designated agent, far from rejecting all, allowed some of respondent's claims (cf. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656), and the court below recognized the propriety of these rejections by itself denying recovery on the bulk of the claims asserted. By entering judgment for respondent for only about $3,500 in the face of respondent's claim for about $20,000, the court below made it manifest that it did not itself believe that the designated agents' "bias" tainted all their actions on respondent's claims.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below is erroneous and should be reversed.

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Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES, PETITIONER

v.

PENNER INSTALLATION CORPORATION

RESPONDENT'S BRIEF

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THE UNITED STATES, PETITIONER

v.

PENNER INSTALLATION CORPORATION

RESPONDENT'S BRIEF

The contract in this case differs from the contract in the *Moorman*[1] case, in that in the *Moorman* case the contract provided that *all* disputes were to be decided by the Contracting Officer, whereas in the instant case the contract provides that all disputes concerning *questions of fact* (R. 16) were to be decided by the Contracting Officer subject to appeal to the Head of the Department. The instant contract is the usual and standard form of contract which has been before the United States Supreme Court and the United States Court of Claims on numerous occasions. The *Moorman* case was an exceptional case and, it is respectfully submitted, should be limited to its own particular facts.

Arbitrariness, Unreasonableness and Gross Mistake were Alleged, Proved and Found by the Court

The brief of the Government proceeds upon the erroneous premise that gross mistake and bad faith were not presented by the pleadings, nor was the case tried upon that premise.

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[1] *Moorman* v. *United States*, 338 U. S. 457.

The Claim of respondent as filed in the Court of Claims specifically alleged in paragraph 6 (R. 1 & 2), "That the defendant breached and violated the terms of the contract, in that it *arbitrarily, unlawfully* • • •; *arbitrarily* and *unreasonably* classified various items of work *erroneously* and *failed* and *refused* to pay • • •; *deliberately* withheld payments • • •; *deliberately underpaid claimant* and *under-estimated the amount of value* of the labor performed and materials furnished • • • ". (Italics ours.)

The case was tried on this theory, the correspondence from Claimant to the Government and all the appeals to the Head of the Department were on this theory.[2]

It was only because of the arbitrary, unreasonable, unlawful acts, bad faith and gross error on the part of the Government, that respondent was granted a judgment.[3]

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[2] An examination of the trial record discloses that with regard to items 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 covered by the Commissioner's findings, the defendant did not submit any evidence to controvert, refute or dispute plaintiff's claim of the amount of damage.

All of the quantities testified to by plaintiff were based on actual field measurements.

None of the quantities allowed by defendant were based on actual field measurements nor were any quantities, as testified to by defendant's witnesses, based on original records made in the field (R. 269 & 370).

Defendant did not attempt to justify, explain or prove the accuracy of any of the quantities or amounts allowed plaintiff. Defendant practically rested its case on the figures it allowed plaintiff.

If such action by the defendant is not arbitrary, unreasonable and so palpably in bad faith as to justify a review by the Court and a reversal if in error, then such a situation is hard to imagine.

[3] With regard to the Pole item the Government admitted that respondent's original proposal was $70 per pole—and further admits that no poles were shown on the Contract Drawings (R. 501 & 502).

Contract Provisions Should Not Be So Strictly Construed As to Deprive a Contractor of the Right to Have the Courts Review the Decisions and Interpretations of Governmental Employees Who Owe Their Allegiance to Their Employer and Whose Duties Require Them to Protect the Interest of the Government.

The Government is attempting to go beyond all conscience and reasonableness in its present application. It is quite frank in what it is attempting to accomplish and from this frankness we find the extent of the arbitrariness and unreasonableness to which it attempts to carry the Contract provisions.

At page 22 of its brief the Government states its position to be that "Were the decision to be final *only if correct* there would be little purpose in including the finality provisions in the Contract, for then it would not operate to reduce the volume of potential litigation which would result from such disputes" and at pages 18 and 19 of its brief states "Since the Arbiters designated in Standard Government Contracts are *always* employed by the Government, *always* owe allegiance to the Government, and the duties of their employment *always* require them to protect the interests of the Government * * *". (Italics ours.) Yet in spite of this the Government still wants the Contractor to be absolutely and irrevocably bound, without any recourse whatsoever, from the decisions of such biased persons.

The admission by the Government in its petition, that the parties who are asked to decide the questions are biased in its favor and owe it allegiance, brings it directly within the rule of *Ripley* v. *U. S.*, 223 U. S. 695, 701, and makes the ruling subject to review (R. 27).

The Court of Claims defined specifically that bias should not enter into any decision, which rule as enunciated should be held up as a beacon determining the standard to be followed by all deciding parties designated by contracts (R. 28 & 29).

> "We are always loath to say that a governmental official has acted in bad faith. Indeed in the many cases that have come before this court there have been but very few instances in which we have found, or thought, that the contracting officer was unfaithful to the Government. Their fidelity is beyond reproach. But it often happens that they misconceive their function. Faithful to the Government they almost always are, but frequently they are lacking in impartiality. And, yet, this is the duty the dispute clause of the contract (article 15) casts upon them.
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> "It is a duty not easily to be discharged, we know. They are the Government's representatives, charged with the duty of seeing that the Government gets what it bargained for. Many contractors, on the other hand, bent upon making as much money as they can out of the contract, are constantly seeking ways out of doing this and doing that. Frequently, it is a constant battle—the contracting officer as the Government's representative, on the one hand, and the contractor on the other. To ask the contracting officer to act impartially when he must decide a dispute between the contractor and his employer is, indeed, putting upon him a burden difficult to bear. And yet the contract requires him to do so.
>
> "So, if any case we say tnat the contracting officer has not acted in good faith, we mean only that he has

not in good faith discharged his duties as an impartial, unbiased judge. We do not at all mean to impugn his fidelity to his employer. Indeed, it is this fidelity to his employer that makes it so difficult for him to act impartially.

"We take it then that in deciding whether or not the contracting officer's decisions are conclusive upon us, we must decide whether or not he has acted without bias and impartially. If so, they are binding; if not, they are not binding.

"In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows and the duties his employment by one of them casts upon him."

The Government in effect is asking the Court to hold that any contract provision, whether or not it is limited to questions of fact or unlimited as to the subject of disputes, forever forecloses the Contractor from having the decision of the biased employees of the Government reviewed by any court of competent jurisdiction.

No Real Appeal Was Ever Granted to Respondent by the Head of the Department.

The Government's prime argument is the fact that the decision of the person designated in the Contract, to wit, the Head of the Department, is final and conclusive on the parties and plaintiff should not be questioned in the absence of gross error or fraud, etc.

In the numerous appeals taken by the Contractor from the arbitrary, unreasonable and palpable erroneous decisions of the contracting officer, the contractor repeatedly kept requesting an oral hearing, but no oral hearing was ever granted. The Contractor's appeals from the action of the Contracting Officer to the Secretary of Commerce were duly and promptly taken, but after the appeals were taken months would elapse before the Secretary of Commerce even acknowledged the receipt of the appeal. As a matter of fact, in most instances, the Secretary of Commerce never even gave the Contractor the courtesy of an acknowledgment of the appeals.[4]

On substantially all of plaintiff's appeals, the Head of the Department, to wit, the Secretary of Commerce, never even made a decision on the action of the Contracting Officer. So that, while the contract provided that an appeal should be taken to the Head of the Department from the action of the Contracting Officer, the Head of the Department, in this case, never actually rendered a decision on these appeals. All the Head of the Department did was act as a rubber stamp for the Contracting Officer, he made no formal decision nor did he make any findings. If this is not actions of such manner as would necessarily imply bad faith, then it can never be found.

At least the Contractor should be given a hearing before an impartial Board to determine the basis and justification

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[4] Respondent took numerous appeals from the Actions of the Contracting Officer (Exhibit 45—R. 283 and 284; Exhibit 48—R. 288; Exhibit 49—R. 288 and 289; Exhibit 54—R. 294; Exhibit 60—R. 297; Exhibit 61—R. 298). The Head of the Department, in this case, the Secretary of Commerce, did nothing about the appeals until many months had elapsed and then, instead of granting a hearing or asking the parties to appear before him or for evidence, merely let the rulings of the Contracting Officer stand.

of its claim. We find in some Governmental Bureaus, such as the Navy and Army Department, a Board of Contract Appeals designated by the Head of the Department, which Boards are composed of one or three disinterested parties, who are not in the employ of the Government and whose duties do not require them to protect the interests of the Government. These Boards hear the appeal and make formal findings after hearing both parties. This was not done in the instant case; the Contractor was never given a hearing.

The Government is asking this Court to affirm the actions of the Contracting Officer, whose decisions are not made final under the contract, in a case where the Contractor was never afforded an opportunity to present his proofs or be present at a hearing before the Head of the Department. Such action is not democracy at work, but arbitrary dictatorship.

Will this Court say that the Contracting Officer whose sole duty it is to be as strict with the Contractor as possible, is to be allowed to make decisions which when presented to the Head of the Department are casually affirmed without any further questioning, and make Contractors accept such procedure without any recourse to the Courts? If such a situation is to be countenanced by the Court, then take out of the contracts all right of appeal and all right of review and put in one clause making the Contracting Officer the sole judge of which he wants or does not want with an express provision that his actions become the law of the case and once a pronouncement has been uttered by the Contracting Officer, his order is inviolate, unquestioned and unquestionable. When such a situation occurs, and such a rule of law is pronounced, governing public contracts; public bidding and benefits by way of

public bidding to the Government become a mere idle gesture.

If such an interpretation is ever placed on clauses of this nature, then the entire purpose and nature of a contract with the Government is effectively and completely frustrated insofar as the Contractor's rights are involved. The requirement for plans and specifications and details regarding the nature of the work become meaningless.

The Government contends that an *incorrect interpretation or a biased interpretation* is final and conclusive on the Contractor. Only the Government then would have any rights under the contract. If this be so we might just as well write a clause in the contract in substantially the following words:

> "The contractor agrees to furnish all labor and material of any nature whatsoever, to be performed in such manner and furnished in such quantities and at such times as the Government's representatives may direct, without limit or restriction."

Any Contractor who then bids a job will know that he is opening up his bank account, his credit and all his assets to the whims and dictates of the Governmental officers in charge of the project, be they right or wrong in their requirements. Anything that they want, he must comply. Any interpretation they make is final and no one may ever review their acts.

It is hard to orient one's mind to such an argument from Governmental counsel in a democracy. A dictatorship might ask for or require such an arbitrary determination. No contract should ever be allowed to be so interpreted as to put one of the contracting parties at the complete

and absolute mercy of the other without any recourse to any court of law, be the other party arbitrary, unreasonable, fair or unfair, right or wrong.

We must repeat what the Government says at page 22 of its brief: "Were the decision to be final *only if correct*, there would be little purpose in including the finality provision in the contract * * * *it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto.*" (Italics ours.) If what the Government wants is granted, then we might as well scrap our system of democracy and discard the Judiciary from any review of Governmental action.

Bias, Error, Arbitrary or Unreasonable Actions on the Part of Parties Charged with the Observance and Enforcement of Contract Provisions Should Not Be Allowed to Stand Inviolate and Not Subject to Review by the Courts.

The Government's brief repeats over and over again the one argument:—Regardless of error—regardless of how the decision came about—regardless of the justification for the findings—regardless of how arbitrary and unreasonable the decision may be—the decision is inviolate, unquestionable and cannot be reviewed by the Courts.

Such an argument is directly contrary to the basic concept of our democracy. In creating our form of government the Constitution provided for a system of checks and balances for all Governmental Acts. Are we to now say that a clause in a contract, prepared by the Government, deprives the Contractor of the same right of checks and balances? That the Executive Branch of the government

who makes the decision is not subject to review by the Judicial Branch of our Government?

If the right of review by the Courts is taken from the Contractor, where will these limitations stop? Where does one draw the line? When is the action of the Head of the Department subject to review—if, as the government argues—it is not subject to review merely because it is wrong?

At such time as the courts rule, as a matter of law, that the contract provisions hold as the Government contends, at that time the courts will deprive the Contractors of any security or reasonableness in their bid and will make public bidding an outright gamble. No longer will any contractor with the Government have any protection, rights or remedies of any nature except an appeal to a prejudiced employee of the Government who owes his livelihood, his allegiance and his future to the party against whom he is asked to rule. When that day comes it is safe to say that the Government will no longer be able to obtain competitive bids. Any man who will risk signing a contract and obligating himself to do whatever an employee of the other side may require, might just as well devote his time and energy to rolling dice or betting on horses with a more reasonable opportunity for success and profit than he would possibly have in a Government contract.

The Government under the interpretation that it is now asking the Court to give to its form of contract, would in short order find itself paying many times the fair value of the work, for every Contractor would be compelled to include in his bid not only the fair value of the work which he thinks he might be required to do, but also the value of any other item directly or indirectly related to the work or project which a biased employee of the Govern-

ment may require him to furnish and perform, without limitation or restriction of any kind.

The Contractor has absolutely no say or discretion in the form of contract he is obligated to sign when doing public work, be it Federal, State or Municipal. While the statement has often been made that the Contractor does not have to bid the contract in the first instance, this argument begs the question and does not answer the purposes of public bidding.

Public bidding was designed to give the Government the opportunity of obtaining the best price from the lowest responsible bidder for the performance of public work, and in comparison with private work the Government's costs have been far below that which private individuals have to spend for comparable structures. Certainly the Contractor can stay out of business, it is true, but if he desires to do public work, which is open to everyone qualified, whereas private work is limited to select parties, then the Contractor must accept the Government's form of contract, "take it or leave it". To that extent the Contractor is not a free agent in determining whether or not he will accept the form of contract offered.

This Court and every other court in the Country, so far as the writer has been able to ascertain, have uniformly held that a contract should be construed most strongly against the party who drew it. Clauses such as Article 15 (R. 10) should be strictly construed against the Government.

As stated by the Court in *Armstrong & Co.* v. *United States*, 98 Ct. Cl. 519, at page 526:

> "Where one party writes a contract in its own language, as the Government did here, and inserts in it

two separate provisions, either of which might apply to a given state of facts, but different legal consequences would result if one, rather than the other, of the two provisions was applied, the other party to the contract is, in the absence of evidence of a contrary intent, entitled to have applied the provision which would be least burdensome to him."

As stated by the New York Court of Appeals in the case of *People ex rel. Wells & Newton Co.* v. *Craig*, 232 N. Y. 125, 144:

> "In the administration of justice the Courts will ever carefully scrutinize contracts which by their terms arbitrarily place one party thereto solely at the mercy of the other party to the instrument and in the interpretation of such contracts will adopt such construction as will be reasonable and just. Every contract implies good faith and fair dealing between the parties to the same."

Also in *Fleischman* v. *Furgueson*, 223 N. Y. 235, 241:

> "It is a well established canon of interpretation that in seeking for the intent of the parties the fact that a construction contended for would make the contract unreasonable may properly be taken into consideration. A court will endeavor to give the construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other. (Schoellkopf v. Coatsworth, 166 N. Y. 77, 84; Heller v. Kalisch, 141 App. Div. 205, 207; Sanford v. Brown Bros. Co., 208 N. Y. 90, 96.)"

Also in *Campbell* v. *State of New York*, 240 App. Div. 304, 309:

> "Every contract implies good faith and fair dealing between the parties to it. The courts always avoid, if possible, any construction of a contract that it is unreasonable or inequitable, and especially one that will place one of the parties at the mercy of the other. (Simon v. Etgen, 213 N. Y. 589.)"

> "The contractor had a right to rely on the good faith of the State and to expect that the contract would be construed in a reasonable and fair way (citation), * * *"

McEligot v. *State*, 246 App. Div. 121, 125.

The Contractor's appeals were as a matter of course determined against it by one who owes his allegiance and is biased in favor of the Government. The rulings of the Contracting Officer were consistently sustained without change or modification in any respect whatsoever, without opinion or findings of fact; yet the Government would now have this Court hold that in spite of such "star chamber proceedings" the Contractor has no further rights or remedies.

The situation as above described and as encountered by the Contractor in the instant case, is not an unusual one. As a matter of fact it is safe and fair to state that it is the usual and customary procedure followed by the Heads of the Departments in substantially all cases in which an appeal is taken from decisions of Contracting Officers where no Board is appointed to hear the appeal. The times when the Head of the Department overrules the Contracting Officer are so few and far between, that percentage-wise

they are negligible. How anyone can have the temerity to say that such a decision should without exception be final and conclusive is beyond comprehension.

The Court of Claims, which hears hundreds of these cases each year, is fully cognizant of the difficulties encountered by the Contractors, and when the stringent ruling in the *Moorman* case came down, the Court realized that the Contractors were faced with disastrous consequences, and we respectfully submit, rightfully, justifiably and in all good conscience has limited the rule of the *Moorman* case to its own particular facts. To do otherwise would be to write the clause in the contract that we have attempted to set forth above. It was never so contemplated and it should never be allowed.

The best expression of the limitation of the *Moorman* case and how it should be restricted in the instant case was recently expressed by the United States Court of Claims in the case of *Wunderlich, et al.* v. *United States,* decided June 5, 1950, No. 43307, in which the Court stated:

> "In the *Moorman* case, *supra,* the Government apparently urged that the question there presented of interpretation of the language of the contract was a question of fact and that, therefore, even if Article 15 was applicable, the departmental decision was final. The court said:
>
> > But while there is much to be said for the argument that the 'interpretation' here presents a question of fact, we need not consider that argument. For a conclusion that the question here is one of law cannot remove the controversy from the ambit of par. 2-16 of the specifications.

In view of this observation of the Supreme Court, we have re-examined the doctrine heretofore applied by this court to this problem.

"We are, of course, aware that questions of the interpretation of written documents are not, speaking with analytical accuracy, in most cases questions of law in the sense that a lawyer or a judge has the special skill needed to answer them. They may be questions of agriculture, or engineering, or finance, or medicine, or law. In the division of judicial functions between the judge and the lay jury which only by accident would have the requisite skill in a particular case, the judge reserved this function to himself, presumably as being more competent than the jury. And judges and lawyers began to call the questions 'questions of law,' as a short way of saying that they should be decided by the judge. This method of expression, though analytically inaccurate was, so far as we know, quite universal. All the courts, including the Supreme Court of the United States, used it, and applied it with serious consequences. *Hamilton* v. *Liverpool, London and Globe Insurance Co.*, 136 U. S. 242, 255, *Bliven, et al.* v. *New England Screw Co.*, 23 How. 420, 433; *Turner, et al.* v. *Yates*, 16 How. 14, 23. Where appellate courts have had jurisdiction to review questions of law but not questions of fact, they have held that they could review questions as to the interpretation of contracts. See *United States* v. *E. J. Biggs Construction Co.*, 116 Fed. 2d 768, 770. Similar statements and decisions were early made by this court with reference to the finality of the decisions of a designated officer in problems arising in government contracts. *Lyons* v. *United States*, 30 C. Cls. 352, 365; *Collins and Farwell* v.

United States, 34 C. Cls. 294, 332. Other Federal Courts held likewise. *Lewis, et al.* v. *Chicago, S. F. & Co. Ry. Co.*, 49 F. 708, 710, 713; *King Iron Bridge & Manufacturing Co.* v. *City of St. Louis*, 43 F. 768. The Government has cited us no authority to the contrary.

"In view of the unanimity of statement by courts that questions of the interpretation of written documents were 'questions of law' the plaintiff urges that the representatives of the Government, and of contractors, who adopted Standard Form 23 which included Article 15, chose the language there used in the light of the then universal usage of the courts, and hence did not mean to include questions of the interpretation of written contracts within the 'questions of fact' which were made subject to final departmental decision. This court and other courts dealing with the question have interpreted Article 15 as the plaintiff would have it interpreted. *Albina Marine Iron Works, Inc.* v. *United States*, 79 C. Cls. 714, 722; *Davis, et al. Trustees* v. *United States*, 82 C. Cls. 334, 346-347; *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461, 477; *Schmoll, Assignee* v. *United States*, 91 C. Cls. 1, 33; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 616-617; *Ruff* v. *United States*, 96 C. Cls. 148, 165; *B-W Construction Company* v. *United States*, 97 C. Cls. 92, 118-119; *John McShain, Inc.* v. *United States*, 97 C. Cls. 281, 295; *Gerhardt F. Meyne Co.* v. *United States*, 110 C. Cls. 527, 548. Other Federal Courts have given the same interpretation to this standard Government contract provision. *General Steel Products Corporation* v. *United States*, 36 F. Supp. 498, 502; *Lundstrom* v. *United States*, 53 F. 2d 709, 711. See also *Central Nebraska Public Power and*

Irrigation District v. *Tobin Quarries,* 157 F. 2d 482, 486.

"Of greater significance, perhaps, is the fact that the Government itself, through its Boards of Contract Appeals set up in the departments to act as the authorized representative of the heads of departments to hear and decide appeals by contractors from the decisions of contracting officers, has also interpreted Article 15 of the standard contract as not including, in its expression 'disputes concerning questions of fact', disagreements as to the interpretation of written contracts. Thus these Boards have, at the urging of the Government, dismissed appeals because they involved such questions. Appeal of *W. F. Trimble & Son Co.,* 1 CCF. 47, 48; Appeal of *Fred A. M. de Groot, Inc.,* 1 CCF. 148, 149; Appeal of *Central Engineering & Contracting Corporation,* 3 CCF. 989, 992; Appeal of *Ross Engineering Company,* 3 CCF. 1153, 1155.

"In the current 'Charter for the Armed Services Board of Contract Appeals', effective May 1, 1949, modified June 30, 1949, in paragraph 4 appears this language:

> When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue.

If the Board 'in its discretion' chose not to consider and decide the pertinent questions of law it would not, presumably, decide the case, hence resort to a court would seem to be open to the contractor. The drafts-

men of the charter were apparently using the expression 'questions of law' with the analytically inaccurate but judicially common meaning described above. The Board, acting under the charter, treats questions of the interpretation of contracts as 'questions of law' and decides them, or refuses to decide them, in its discretion. See Appeal of *B. G. Cury Co.*, ASBCA No. 227, Oct. 27, 1949; Id. ASBCA No. 228, Oct. 27, 1949; Id. ASBCA No. 286, Nov. 21, 1949: *Erman Howell Division, Luria Steel and Trading Corporation*, ASBCA No. 188, Nov. 29, 1949; *Franklin Iron and Metal Co.*, ASBCA No. 194, Nov. 30, 1949. We think it would be intolerable that this court should refuse to consider claims involving interpretation of contracts, when the departmental board is directed to hear them only 'in its discretion'. Is the contractor supposed to have agreed that he may have a departmental ruling only if the departmental board chooses to give him one; that he may find out whether they will give him one only by going to the trouble and expense of preparing the case for the board, but that if they do choose to give him a ruling, it will be final?

"When the Boards have decided questions of interpretation on appeal, they have made it plain that they were doing so, not because the 'disputes concerning questions of fact' clause of the contract authorized them to do it, but because the plaintiff had asked for the decision and the head of the department had authorized the board to make it. See Appeal of *Robert E. McKee*, BCA No. 1617, Jan. 21, 1948; Appeal of *S. K. Jones Construction Co.*, BCA No. 1619, Feb. 6, 1948. See our decision of today in *McWilliams Dredging Co.* v. *United States*, No. 48894, for an explanation

of why such a decision of the Board does not foreclose the contractor from litigating the question in a court."

A clearer enunciation of the law cannot be expressed.

It is respectfully submitted that there is no basis or justification for any expansion of the *Moorman* case. The facts and contract provisions in the instant case are different and in no manner create any question or conflict with the *Moorman* case. The distinctions and limitations as defined by the Court of Claims in this case and in the *Wunderlich* case are sound and should not be disturbed.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

ALBERT FOREMAN,
Attorney.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys for Respondent.

No. 170

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Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES, PETITIONER

v.

PENNER INSTALLATION CORPORATION

RESPONDENT'S BRIEF

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Attorneys for Respondent.

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RESPONDENT'S BRIEF

The contract in this case differs from the contract in the *Moorman*[1] case, in that in the *Moorman* case the contract provided that *all* disputes were to be decided by the Contracting Officer, whereas in the instant case the contract provides that all disputes concerning *questions of fact* (R. 16) were to be decided by the Contracting Officer subject to appeal to the Head of the Department. The instant contract is the usual and standard form of contract which has been before the United States Supreme Court and the United States Court of Claims on numerous occasions. The *Moorman* case was an exceptional case and, it is respectfully submitted, should be limited to its own particular facts.

Arbitrariness, Unreasonableness and Gross Mistake were Alleged, Proved and Found by the Court

The brief of the Government proceeds upon the erroneous premise that gross mistake and bad faith were not presented by the pleadings, nor was the case tried upon that premise.

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[1] *Moorman* v. *United States*, 338 U. S. 457.

The Claim of respondent as filed in the Court of Claims specifically alleged in paragraph 6 (R. 1 & 2), "That the defendant breached and violated the terms of the contract, in that it *arbitrarily, unlawfully* • • •; *arbitrarily* and *unreasonably* classified various items of work *erroneously* and *failed* and *refused* to pay • • •; *deliberately* withheld payments • • •; *deliberately underpaid claimant* and *under-estimated the amount of value* of the labor performed and materials furnished • • • ". (Italics ours.)

The case was tried on this theory, the correspondence from Claimant to the Government and all the appeals to the Head of the Department were on this theory.[2]

It was only because of the arbitrary, unreasonable, unlawful acts, bad faith and gross error on the part of the Government, that respondent was granted a judgment.[3]

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[2] An examination of the trial record discloses that with regard to items 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 covered by the Commissioner's findings, the defendant did not submit any evidence to controvert, refute or dispute plaintiff's claim of the amount of damage.

All of the quantities testified to by plaintiff were based on actual field measurements.

None of the quantities allowed by defendant were based on actual field measurements nor were any quantities, as testified to by defendant's witnesses, based on original records made in the field (R. 269 & 370).

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The Government is attempting to go beyond all conscience and reasonableness in its present application. It is quite frank in what it is attempting to accomplish and from this frankness we find the extent of the arbitrariness and unreasonableness to which it attempts to carry the Contract provisions.

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>
> "So, if any case we say that the contracting officer has not acted in good faith, we mean only that he has

not in good faith discharged his duties as an impartial, unbiased judge. We do not at all mean to impugn his fidelity to his employer. Indeed, it is this fidelity to his employer that makes it so difficult for him to act impartially.

"We take it then that in deciding whether or not the contracting officer's decisions are conclusive upon us, we must decide whether or not he has acted without bias and impartially. If so, they are binding; if not, they are not binding.

"In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows and the duties his employment by one of them casts upon him."

The Government in effect is asking the Court to hold that any contract provision, whether or not it is limited to questions of fact or unlimited as to the subject of disputes, forever forecloses the Contractor from having the decision of the biased employees of the Government reviewed by any court of competent jurisdiction.

No Real Appeal Was Ever Granted to Respondent by the Head of the Department.

The Government's prime argument is the fact that the decision of the person designated in the Contract, to wit, the Head of the Department, is final and conclusive on the parties and plaintiff should not be questioned in the absence of gross error or fraud, etc.

In the numerous appeals taken by the Contractor from the arbitrary, unreasonable and palpable erroneous decisions of the contracting officer, the contractor repeatedly kept requesting an oral hearing, but no oral hearing was ever granted. The Contractor's appeals from the action of the Contracting Officer to the Secretary of Commerce were duly and promptly taken, but after the appeals were taken months would elapse before the Secretary of Commerce even acknowledged the receipt of the appeal. As a matter of fact, in most instances, the Secretary of Commerce never even gave the Contractor the courtesy of an acknowledgment of the appeals.[4]

On substantially all of plaintiff's appeals, the Head of the Department, to wit, the Secretary of Commerce, never even made a decision on the action of the Contracting Officer. So that, while the contract provided that an appeal should be taken to the Head of the Department from the action of the Contracting Officer, the Head of the Department, in this case, never actually rendered a decision on these appeals. All the Head of the Department did was act as a rubber stamp for the Contracting Officer, he made no formal decision nor did he make any findings. If this is not actions of such manner as would necessarily imply bad faith, then it can never be found.

At least the Contractor should be given a hearing before an impartial Board to determine the basis and justification

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[4] Respondent took numerous appeals from the Actions of the Contracting Officer (Exhibit 45—R. 283 and 284; Exhibit 48—R. 288; Exhibit 49—R. 288 and 289; Exhibit 54—R. 294; Exhibit 60—R. 297; Exhibit 61—R. 298). The Head of the Department, in this case, the Secretary of Commerce, did nothing about the appeals until many months had elapsed and then, instead of granting a hearing or asking the parties to appear before him or for evidence, merely let the rulings of the Contracting Officer stand.

of its claim. We find in some Governmental Bureaus, such as the Navy and Army Department, a Board of Contract Appeals designated by the Head of the Department, which Boards are composed of one or three disinterested parties, who are not in the employ of the Government and whose duties do not require them to protect the interests of the Government. These Boards hear the appeal and make formal findings after hearing both parties. This was not done in the instant case; the Contractor was never given a hearing.

The Government is asking this Court to affirm the actions of the Contracting Officer, whose decisions are not made final under the contract, in a case where the Contractor was never afforded an opportunity to present his proofs or be present at a hearing before the Head of the Department. Such action is not democracy at work, but arbitrary dictatorship.

Will this Court say that the Contracting Officer whose sole duty it is to be as strict with the Contractor as possible, is to be allowed to make decisions which when presented to the Head of the Department are casually affirmed without any further questioning, and make Contractors accept such procedure without any recourse to the Courts? If such a situation is to be countenanced by the Court, then take out of the contracts all right of appeal and all right of review and put in one clause making the Contracting Officer the sole judge of which he wants or does not want with an express provision that his actions become the law of the case and once a pronouncement has been uttered by the Contracting Officer, his order is inviolate, unquestioned and unquestionable. When such a situation occurs, and such a rule of law is pronounced, governing public contracts; public bidding and benefits by way of

public bidding to the Government become a mere idle gesture.

If such an interpretation is ever placed on clauses of this nature, then the entire purpose and nature of a contract with the Government is effectively and completely frustrated insofar as the Contractor's rights are involved. The requirement for plans and specifications and details regarding the nature of the work become meaningless.

The Government contends that an *incorrect interpretation or a biased interpretation* is final and conclusive on the Contractor. Only the Government then would have any rights under the contract. If this be so we might just as well write a clause in the contract in substantially the following words:

> "The contractor agrees to furnish all labor and material of any nature whatsoever, to be performed in such manner and furnished in such quantities and at such times as the Government's representatives may direct, without limit or restriction."

Any Contractor who then bids a job will know that he is opening up his bank account, his credit and all his assets to the whims and dictates of the Governmental officers in charge of the project, be they right or wrong in their requirements. Anything that they want, he must comply. Any interpretation they make is final and no one may ever review their acts.

It is hard to orient one's mind to such an argument from Governmental counsel in a democracy. A dictatorship might ask for or require such an arbitrary determination. No contract should ever be allowed to be so interpreted as to put one of the contracting parties at the complete

and absolute mercy of the other without any recourse to any court of law, be the other party arbitrary, unreasonable, fair or unfair, right or wrong.

We must repeat what the Government says at page 22 of its brief: "Were the decision to be final *only if correct*, there would be little purpose in including the finality provision in the contract * * * *it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto.*" (Italics ours.) If what the Government wants is granted, then we might as well scrap our system of democracy and discard the Judiciary from any review of Governmental action.

Bias, Error, Arbitrary or Unreasonable Actions on the Part of Parties Charged with the Observance and Enforcement of Contract Provisions Should Not Be Allowed to Stand Inviolate and Not Subject to Review by the Courts.

The Government's brief repeats over and over again the one argument:—Regardless of error—regardless of how the decision came about—regardless of the justification for the findings—regardless of how arbitrary and unreasonable the decision may be—the decision is inviolate, unquestionable and cannot be reviewed by the Courts.

Such an argument is directly contrary to the basic concept of our democracy. In creating our form of government the Constitution provided for a system of checks and balances for all Governmental Acts. Are we to now say that a clause in a contract, prepared by the Government, deprives the Contractor of the same right of checks and balances? That the Executive Branch of the government

who makes the decision is not subject to review by the Judicial Branch of our Government?

If the right of review by the Courts is taken from the Contractor, where will these limitations stop? Where does one draw the line? When is the action of the Head of the Department subject to review—if, as the government argues—it is not subject to review merely because it is wrong?

At such time as the courts rule, as a matter of law, that the contract provisions hold as the Government contends, at that time the courts will deprive the Contractors of any security or reasonableness in their bid and will make public bidding an outright gamble. No longer will any contractor with the Government have any protection, rights or remedies of any nature except an appeal to a prejudiced employee of the Government who owes his livelihood, his allegiance and his future to the party against whom he is asked to rule. When that day comes it is safe to say that the Government will no longer be able to obtain competitive bids. Any man who will risk signing a contract and obligating himself to do whatever an employee of the other side may require, might just as well devote his time and energy to rolling dice or betting on horses with a more reasonable opportunity for success and profit than he would possibly have in a Government contract.

The Government under the interpretation that it is now asking the Court to give to its form of contract, would in short order find itself paying many times the fair value of the work, for every Contractor would be compelled to include in his bid not only the fair value of the work which he thinks he might be required to do, but also the value of any other item directly or indirectly related to the work or project which a biased employee of the Govern-

ment may require him to furnish and perform, without limitation or restriction of any kind.

The Contractor has absolutely no say or discretion in the form of contract he is obligated to sign when doing public work, be it Federal, State or Municipal. While the statement has often been made that the Contractor does not have to bid the contract in the first instance, this argument begs the question and does not answer the purposes of public bidding.

Public bidding was designed to give the Government the opportunity of obtaining the best price from the lowest responsible bidder for the performance of public work, and in comparison with private work the Government's costs have been far below that which private individuals have to spend for comparable structures. Certainly the Contractor can stay out of business, it is true, but if he desires to do public work, which is open to everyone qualified, whereas private work is limited to select parties, then the Contractor must accept the Government's form of contract, "take it or leave it". To that extent the Contractor is not a free agent in determining whether or not he will accept the form of contract offered.

This Court and every other court in the Country, so far as the writer has been able to ascertain, have uniformly held that a contract should be construed most strongly against the party who drew it. Clauses such as Article 15 (R. 10) should be strictly construed against the Government.

As stated by the Court in *Armstrong & Co.* v. *United States*, 98 Ct. Cl. 519, at page 526:

> "Where one party writes a contract in its own language, as the Government did here, and inserts in it

two separate provisions, either of which might apply to a given state of facts, but different legal consequences would result if one, rather than the other, of the two provisions was applied, the other party to the contract is, in the absence of evidence of a contrary intent, entitled to have applied the provision which would be least burdensome to him."

As stated by the New York Court of Appeals in the case of *People ex rel. Wells & Newton Co.* v. *Craig*, 232 N. Y. 125, 144:

"In the administration of justice the Courts will ever carefully scrutinize contracts which by their terms arbitrarily place one party thereto solely at the mercy of the other party to the instrument and in the interpretation of such contracts will adopt such construction as will be reasonable and just. Every contract implies good faith and fair dealing between the parties to the same."

Also in *Fleischman* v. *Furgueson*, 223 N. Y. 235, 241:

"It is a well established canon of interpretation that in seeking for the intent of the parties the fact that a construction contended for would make the contract unreasonable may properly be taken into consideration. A court will endeavor to give the construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other. (Schoellkopf v. Coatsworth, 166 N. Y. 77, 84; Heller v. Kalisch, 141 App. Div. 205, 207; Sanford v. Brown Bros. Co., 208 N. Y. 90, 96.)"

Also in *Campbell* v. *State of New York*, 240 App. Div. 304, 309:

> "Every contract implies good faith and fair dealing between the parties to it. The courts always avoid, if possible, any construction of a contract that it is unreasonable or inequitable, and especially one that will place one of the parties at the mercy of the other. (Simon v. Etgen, 213 N. Y. 589.)"

> "The contractor had a right to rely on the good faith of the State and to expect that the contract would be construed in a reasonable and fair way (citation), • • • "

McEligot v. *State*, 246 App. Div. 121, 125.

The Contractor's appeals were as a matter of course determined against it by one who owes his allegiance and is biased in favor of the Government. The rulings of the Contracting Officer were consistently sustained without change or modification in any respect whatsoever, without opinion or findings of fact; yet the Government would now have this Court hold that in spite of such "star chamber proceedings" the Contractor has no further rights or remedies.

The situation as above described and as encountered by the Contractor in the instant case, is not an unusual one. As a matter of fact it is safe and fair to state that it is the usual and customary procedure followed by the Heads of the Departments in substantially all cases in which an appeal is taken from decisions of Contracting Officers where no Board is appointed to hear the appeal. The times when the Head of the Department overrules the Contracting Officer are so few and far between, that percentage-wise

they are negligible. How anyone can have the temerity to say that such a decision should without exception be final and conclusive is beyond comprehension.

The Court of Claims, which hears hundreds of these cases each year, is fully cognizant of the difficulties encountered by the Contractors, and when the stringent ruling in the *Moorman* case came down, the Court realized that the Contractors were faced with disastrous consequences, and we respectfully submit, rightfully, justifiably and in all good conscience has limited the rule of the *Moorman* case to its own particular facts. To do otherwise would be to write the clause in the contract that we have attempted to set forth above. It was never so contemplated and it should never be allowed.

The best expression of the limitation of the *Moorman* case and how it should be restricted in the instant case was recently expressed by the United States Court of Claims in the case of *Wunderlich, et al.* v. *United States,* decided June 5, 1950, No. 43307, in which the Court stated:

> "In the *Moorman* case, *supra,* the Government apparently urged that the question there presented of interpretation of the language of the contract was a question of fact and that, therefore, even if Article 15 was applicable, the departmental decision was final. The court said:
>
> > But while there is much to be said for the argument that the 'interpretation' here presents a question of fact, we need not consider that argument. For a conclusion that the question here is one of law cannot remove the controversy from the ambit of par. 2-16 of the specifications.

In view of this observation of the Supreme Court, we have re-examined the doctrine heretofore applied by this court to this problem.

"We are, of course, aware that questions of the interpretation of written documents are not, speaking with analytical accuracy, in most cases questions of law in the sense that a lawyer or a judge has the special skill needed to answer them. They may be questions of agriculture, or engineering, or finance, or medicine, or law. In the division of judicial functions between the judge and the lay jury which only by accident would have the requisite skill in a particular case, the judge reserved this function to himself, presumably as being more competent than the jury. And judges and lawyers began to call the questions 'questions of law,' as a short way of saying that they should be decided by the judge. This method of expression, though analytically inaccurate was, so far as we know, quite universal. All the courts, including the Supreme Court of the United States, used it, and applied it with serious consequences. *Hamilton* v. *Liverpool, London and Globe Insurance Co.*, 136 U. S. 242, 255, *Bliven, et al.* v. *New England Screw Co.*, 23 How. 420, 433; *Turner, et al.* v. *Yates*, 16 How. 14, 23. Where appellate courts have had jurisdiction to review questions of law but not questions of fact, they have held that they could review questions as to the interpretation of contracts. See *United States* v. *E. J. Biggs Construction Co.*, 116 Fed. 2d 768, 770. Similar statements and decisions were early made by this court with reference to the finality of the decisions of a designated officer in problems arising in government contracts. *Lyons* v. *United States*, 30 C. Cls. 352, 365; *Collins and Farwell* v.

United States, 34 C. Cls. 294, 332. Other Federal Courts held likewise. *Lewis, et al.* v. *Chicago, S. F. & Co. Ry. Co.*, 49 F. 708, 710, 713; *King Iron Bridge & Manufacturing Co.* v. *City of St. Louis*, 43 F. 768. The Government has cited us no authority to the contrary.

"In view of the unanimity of statement by courts that questions of the interpretation of written documents were 'questions of law' the plaintiff urges that the representatives of the Government, and of contractors, who adopted Standard Form 23 which included Article 15, chose the language there used in the light of the then universal usage of the courts, and hence did not mean to include questions of the interpretation of written contracts within the 'questions of fact' which were made subject to final departmental decision. This court and other courts dealing with the question have interpreted Article 15 as the plaintiff would have it interpreted. *Albina Marine Iron Works, Inc.* v. *United States*, 79 C. Cls. 714, 722; *Davis, et al. Trustees* v. *United States*, 82 C. Cls. 334, 346-347; *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461, 477; *Schmoll, Assignee* v. *United States*, 91 C. Cls. 1, 33; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 616-617; *Ruff* v. *United States*, 96 C. Cls. 148, 165; *B-W Construction Company* v. *United States*, 97 C. Cls. 92, 118-119; *John McShain, Inc.* v. *United States*, 97 C. Cls. 281, 295; *Gerhardt F. Meyne Co.* v. *United States*, 110 C. Cls. 527, 548. Other Federal Courts have given the same interpretation to this standard Government contract provision. *General Steel Products Corporation* v. *United States*, 36 F. Supp. 498, 502; *Lundstrom* v. *United States*, 53 F. 2d 709, 711. See also *Central Nebraska Public Power and*

Irrigation District v. *Tobin Quarries*, 157 F. 2d 482, 486.

"Of greater significance, perhaps, is the fact that the Government itself, through its Boards of Contract Appeals set up in the departments to act as the authorized representative of the heads of departments to hear and decide appeals by contractors from the decisions of contracting officers, has also interpreted Article 15 of the standard contract as not including, in its expression 'disputes concerning questions of fact', disagreements as to the interpretation of written contracts. Thus these Boards have, at the urging of the Government, dismissed appeals because they involved such questions. Appeal of *W. F. Trimble & Son Co.*, 1 CCF. 47, 48; Appeal of *Fred A. M. de Groot, Inc.*, 1 CCF. 148, 149; Appeal of *Central Engineering & Contracting Corporation*, 3 CCF. 989, 992; Appeal of *Ross Engineering Company*, 3 CCF. 1153, 1155.

"In the current 'Charter for the Armed Services Board of Contract Appeals', effective May 1, 1949, modified June 30, 1949, in paragraph 4 appears this language:

> When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue.

If the Board 'in its discretion' chose not to consider and decide the pertinent questions of law it would not, presumably, decide the case, hence resort to a court would seem to be open to the contractor. The drafts-

men of the charter were apparently using the expression 'questions of law' with the analytically inaccurate but judicially common meaning described above. The Board, acting under the charter, treats questions of the interpretation of contracts as 'questions of law' and decides them, or refuses to decide them, in its discretion. See Appeal of *B. G. Cury Co.*, ASBCA No. 227, Oct. 27, 1949; Id. ASBCA No. 228, Oct. 27, 1949; Id. ASBCA No. 286, Nov. 21, 1949: *Erman Howell Division, Luria Steel and Trading Corporation*, ASBCA No. 188, Nov. 29, 1949; *Franklin Iron and Metal Co.*, ASBCA No. 194, Nov. 30, 1949. We think it would be intolerable that this court should refuse to consider claims involving interpretation of contracts, when the departmental board is directed to hear them only 'in its discretion'. Is the contractor supposed to have agreed that he may have a departmental ruling only if the departmental board chooses to give him one; that he may find out whether they will give him one only by going to the trouble and expense of preparing the case for the board, but that if they do choose to give him a ruling, it will be final?

"When the Boards have decided questions of interpretation on appeal, they have made it plain that they were doing so, not because the 'disputes concerning questions of fact' clause of the contract authorized them to do it, but because the plaintiff had asked for the decision and the head of the department had authorized the board to make it. See Appeal of *Robert E. McKee*, BCA No. 1617, Jan. 21, 1948; Appeal of *S. K. Jones Construction Co.*, BCA No. 1619, Feb. 6, 1948. See our decision of today in *McWilliams Dredging Co.* v. *United States*, No. 48894, for an explanation

of why such a decision of the Board does not foreclose the contractor from litigating the question in a court."

A clearer enunciation of the law cannot be expressed.

It is respectfully submitted that there is no basis or justification for any expansion of the *Moorman* case. The facts and contract provisions in the instant case are different and in no manner create any question or conflict with the *Moorman* case. The distinctions and limitations as defined by the Court of Claims in this case and in the *Wunderlich* case are sound and should not be disturbed.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

ALBERT FOREMAN,
Attorney.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 170

THE UNITED STATES OF AMERICA, PETITIONER

v.

PENNER INSTALLATION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR REHEARING

The Solicitor General on behalf of the petitioner, the United States of America, respectfully prays for a rehearing of this case before a full bench.

Certiorari was granted in this case on October 9, 1950, with all justices participating. Journal, Supreme Court, p. 5. The case was argued on November 30, 1950, before a bench comprised of eight justices. The Chief Justice was not sitting on that day. Journal, Supreme Court, p. 78. A judgment of affirmance by an evenly divided court of eight justices was entered on December 11, 1950, with a notation that the Chief Justice took no part in the consideration or decision of the case. Journal, Supreme Court, p. 89.

This petition for rehearing is predicated on the assumption that the Chief Justice took no part only because of his absence from the bench during the oral argument of this cause. In the light of the Chief Justice's participation in the granting of the writ, it would appear that an argument could be had before the full bench, should rehearing be authorized.

This case basically involves the questions (1) whether a decision of an administrative official of the Government, made final by the terms of the contract, may be set aside on any ground other than bad faith or error so gross as necessarily to imply bad faith, and (2) whether it must appear from the findings of the Court of Claims that the evidence, upon which the court bases its finding of gross error such as necessarily implies bad faith, is the same as that which was before the contract arbiters. These questions are of great importance in the conduct of Government litigation before the Court of Claims in cases involving contractual provisions making the findings of designated Government officials final. Since its decision in the *Penner* case, the Court of Claims, in the *Great Lakes Dredge and Dock Co.* v. *United States,* 90 F. Supp. 963, and *Martin Wunderlich* v. *United States,* Court of Claims No. 46307, decided June 5, 1950, has relied upon its opinion in the *Penner* case in disregarding a finding made by a contracting officer and approved by the head of the department. It is reasonably

to be anticipated that the question will be constantly recurring and one which this Court ultimately will be called upon to resolve.

This Court has frequently granted rehearing following a decision by an equally divided Court, especially when a justice who did not participate in the original decision is available for the rehearing. *Home Insurance Co.* v. *New York,* 119 U. S. 129, 148; 122 U. S. 636; 134 U. S. 594. *Selma, Rome & Dalton R. R. Co.* v. *United States,* 122 U. S. 636–637; 139 U. S. 560. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 586; 158 U. S. 601, 602–607. *United States* v. *Grimaud,* 216 U. S. 614, 615; 220 U. S. 506. *United States* v. *Sischo,* 260 U. S. 697–698; 260 U. S. 701; 262 U. S. 165. *United States* v. *One 1936 Model Ford V–8 De Luxe Coach,* 305 U. S. 564; 305 U. S. 666; 307 U. S. 219; *Halliburton Co.* v. *Walker,* 326 U. S. 696; 327 U. S. 812; 329 U. S. 1; *MacGregor* v. *Westinghouse Electric & Mfg. Co.,* 327 U. S. 758; 327 U. S. 812; 329 U. S. 402; *Bruce's Juices* v. *American Can Co.,* 327 U. S. 758; 327 U. S. 812; 330 U. S. 743. This case is an appropriate one for like action. If the finality provisions of government contracts are to be disregarded whenever the Court of Claims differs sharply from the factual findings made by the designated arbiters, and the contractual provisions whereby the Government has undertaken to reduce litigation to a minimum thus drastically undermined, that consequence should follow,

if it must, from an opinion of this Court, if an equal division is avoidable.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1950.

U. S. GOVERNMENT PRINTING OFFICE 1950

No. 170

Office - Supreme Court, U. S.
FILED
JAN 4 1951
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1950

THE UNITED STATES OF AMERICA,
Petitioner,

—against—

PENNEY INSTALLATION CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING

The respondent respectfully submits that a rehearing in the instant matter is not justified.

The decision of the Court of Claims as affirmed by an equally divided Court is as important to respondent and other contractors doing business with the Government as it is to the Government. This fact in and of itself, we submit, does not justify a rehearing, any more than a rehearing is justified in every case decided by this Court. There is no question that every case before this Court is of the utmost importance to both parties involved. This, however, does not justify a rehearing.

If this Court desired a rehearing, it would have ordered it without waiting for application of counsel. *Brown* v. *Aspeden*, 55 U. S. 25; *St. Louis Public Schools* v. *Walker*, 9 Wall 603.

We have carefully examined the cases cited by petitioner in support of its argument that this Court has

granted rehearing following a decision by an equally divided Court. *Everyone of the cases cited by petitioner deals with either a constitutional question or the interpretation of a federal statute or both.*

As stated by Mr. Chief Justice Waite in the cases of *Shreveport* v. *Holmes; Shreveport* v. *Crooks; Shreveport* v. *Carter,* 125 U. S. 694:

> "These petitions are denied. The rehearing was granted in Holmes Insurance Company v. New York, 119 U. S. 129, after a decision by a divided Court, because an important constitutional question was involved. The question in these cases are not of that character."

The identical situation exists in the instant matter.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

ALBERT FOREMAN,
Attorney for Respondent.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys.

Per Curiam Decisions.

No. 170. UNITED STATES *v.* PENNER INSTALLATION CORP. Certiorari, 340 U. S. 808, to the Court of Claims. Argued November 30, 1950. Decided December 11, 1950. *Per Curiam:* The judgment is affirmed by an equally divided Court. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *Paul A. Sweeney* argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Acting Assistant Attorney General Clapp*. *Albert Foreman* argued the cause for respondent. With him on the brief was *M. Carl Levine*. Reported below: 116 Ct. Cl. 550, 89 F. Supp. 545.